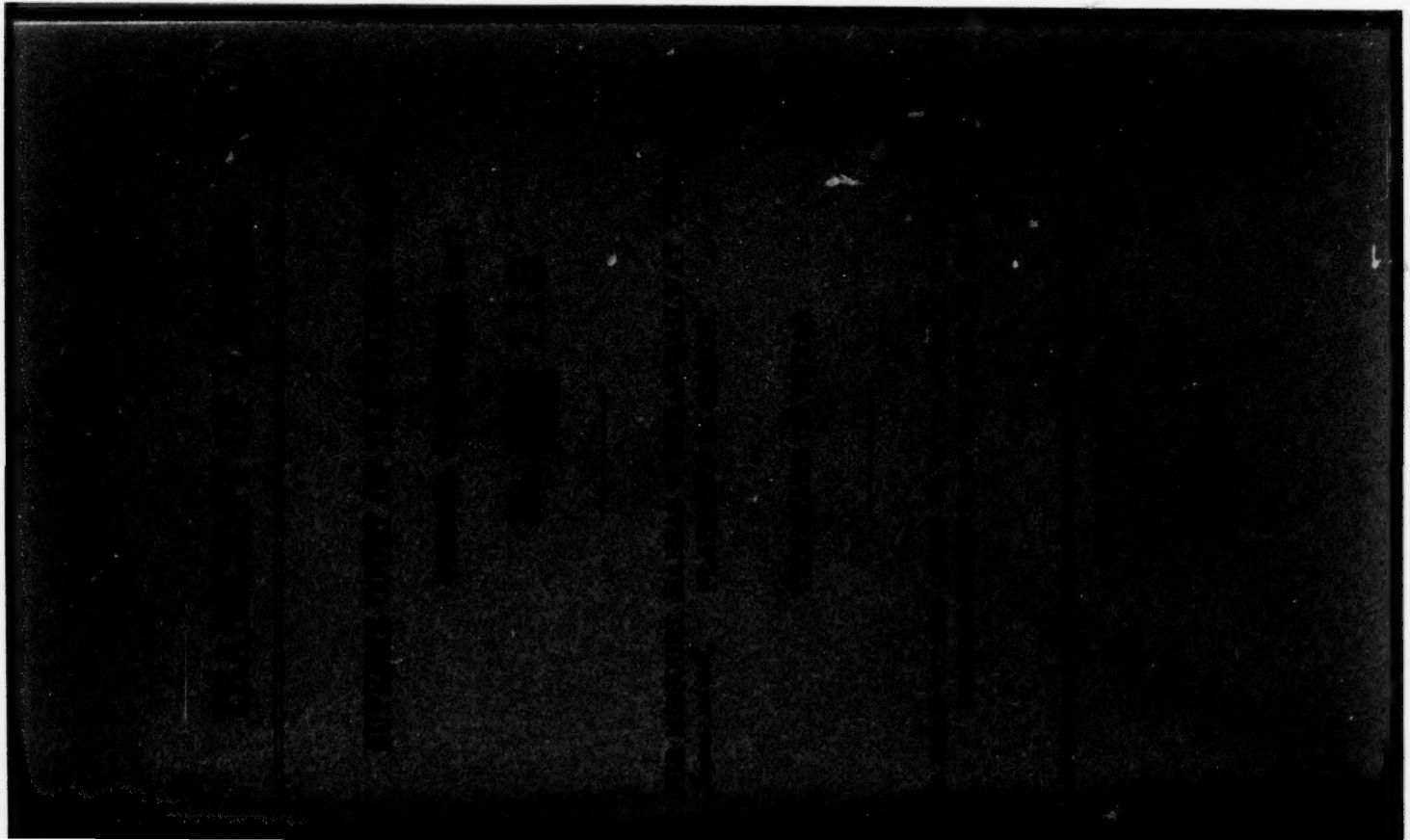

(25,164)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 398.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY of Texas, et al. PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript of record from the District Court of Travis County.	1	1
Caption	1	1
Plaintiff's original petition	2	1
Answer	28	19
Judgment	36	24
Findings of fact	37	24
Conclusions of law	52	35
Defendant's motion for new trial	55	37
Order overruling motion for new trial	71	47
Assignment of errors	72	47
Bill for costs	94	62
Appeal bond	95	62
Clerk's certificate	97	64
Statement of facts	99	65
Agreement as to facts	100	65
Testimony of W. G. Crush	129	80

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 3, 1917.

	Original.	Print
Testimony of J. Monday	161	99
W. G. Crush (recalled)	163	100
Census statement, &c.	165	101
Statement showing number of local and interline State tickets sold, &c.	166	103
Judge's certificate to statement of facts	180	115
Judgment	181	116
Opinion, Rice, J.	181	116
Appellee's motion for rehearing	188	120
Judgment	218	142
Opinion, Rice, J.	218	143
Appellant's motion for rehearing	223	146
Order overruling motion for rehearing	236	155
Petition for writ of error and assignment of errors	237	155
Order refusing writ of error	288	190
Opinion refusing writ of error	289	190
Motion for rehearing in Supreme Court	295	194
Order of Supreme Court overruling motion for rehearing	312	204
Bill of costs in Supreme Court	313	205
Petition for writ of error	314	206
Order allowing writ of error	316	207
Assignment of errors	317	208
Order allowing writ of error	319	209
Bond on writ of error	320	210
Bill of costs	322	211
Clerk's certificate	323	212
Petition for writ of error	324	212
Order allowing writ of error	327	214
Assignment of errors	329	214
Writ of error	332	216
Citation and service	335	217

a Be it remembered that at a term of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, begun in the City of Austin, Texas, on the first Monday in October, 1912, and holden at the Court-room of said court, in the Capitol Building and continuing from day to day, and from term to term, till the term of said court beginning on the first Monday in October, 1915, the following among other cases, was determined—

Wednesday, May 13th, 1913.

No. 5159.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Travis County District Court.

Judgment affirmed.

1 *Caption.*

THE STATE OF TEXAS,
County of Travis:

At a term of the District Court of the 53rd Judicial District of Texas, begun and holden at Austin, within and for the County of Travis, before the Honorable George Calhoun, Judge thereof presiding, and which adjourned on the 29th day of June, A. D. 1912, the following case came on for trial, to wit:

No. 28684.

THE STATE OF TEXAS
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

2 *Plaintiff's Original Petition.*

Filed Jan. 5, 1912.

THE STATE OF TEXAS,
County of Travis:

In the District Court of Travis Co., 53rd Judicial District, April Term, A. D. 1912.

To the Hon. George Calhoun, Judge of said Court:

Now comes the State of Texas, appearing herein through her Attorney General, Jewel P. Lightfoot, said Attorney General acting

herein under instructions from the Railroad Commission of Texas, complaining of the Missouri, Kansas & Texas Railway Company of Texas, hereinafter styled defendant, and respectfully shows to the Court:

1. The defendant is a railroad corporation organized and existing under the laws of the State of Texas, and that A. D. Bethard is the Vice-president and General Manager, and an agent of said corporation and resides in Dallas County, Texas, and upon him service of process may be had.

2. That the defendant owns and operates a line of railroad in the State of Texas extending from, among other places, the City of Denison, to the City of Austin in said State, both of which said cities are regular stations on defendant's said line of railroad; that defendant's said line of railroad also passes into and through the cities of Dallas, Hillsboro and Granger, all of which are also regular stations on defendant's said line of railroad and that from the 8th day of September, 1910, until the 8th day of November, 1910, and including both of said dates, defendant operated a passenger train known and designated as train No. 9 on and upon its said line of railroad and from said City of Denison to said City of Austin,
3 and which passes to and through said cities of Dallas, Hillsboro and Granger aforesaid.

That defendant also owns and operates a line of railroad from the City of Denison to and through the Cities of Whitesboro and Fort Worth and to the City of Hillsboro, in the State of Texas, all of which said cities are regular stations on defendant's said line of railroad and that from the 8th day of September, 1910, until the 8th day of November, 1910, and including both of said dates, defendant operated a passenger train, known and designated as train No. 209 on and upon its said line of railroad and from said City of Denison to and through said cities of Whitesboro and Fort Worth and to said City of Hillsboro aforesaid.

4. Plaintiff further alleges that it is the duty of the defendant to start its passenger trains from points of origin in accordance with the advertised schedule and to run such passenger trains at regular times to be fixed by public notice and a failure so to do is an abuse of its rights and privileges as a railroad company, which said abuse is subject to regulation and correction by the Railroad Commission of Texas.

5. Plaintiff alleges that heretofore, to-wit, on the 23rd day of February, 1907, an order was duly entered and adopted by the Railroad Commission of Texas, which was designated as "Passenger Circular No. 18" and wherein it was ordered by the said Railroad Commission as follows:

4 Office of Railroad Commission of Texas.

Passenger Circular No. 18.

Amending Passenger Circular No. 16.

AUSTIN, TEXAS, February 23, 1907.

In approval of applications presented to this commission by various railroad companies operating in this State, it is ordered by the Railroad Commission of Texas that Passenger Circular No. 16, issued by this Commission on February 5, 1907, and containing rules and regulations governing the operation of passenger trains, be amended and the following be adopted as a substitute therefor and re-issue of the provisions thereof;

Rule 1. Each and every railroad company operating a railroad in this State, shall operate over all parts of its line or lines, at least one train each way every day (Sundays excepted) for the transportation of passengers.

Rule 2. Each and every railroad company operating a railroad in this State, shall start its passenger trains from points of origin in accordance with advertised schedule, and said trains, except from unavoidable accidents thereto en route shall observe and conform to the published schedule as to arrival and departure at the several stations on the line; provided that trains may be held not to exceed thirty (30) minutes at origin or at junction points with other lines to make connection with trains on such other lines. If, at the expiration of said thirty minutes, connecting trains are in sight a reasonable time, in addition to said thirty minutes, will be allowed in which to make the connection. Where connecting trains arrive within the time above allowed, a reasonable time, in addition to the above provided for, will be allowed for transfer of passengers, mail, express and baggage. Where connections are reliably re-
5 ported to be more than 30 minutes late, no wait will be made.

Exception- to Rule 2.

1. International & Great Northern Railroad:

Trains Nos. 4 and 5 between Longview Jct. and Laredo.

Train Nos. 4 and 5 between Galveston and Palestine.

All trains on Henderson, Mineola, Huntsville, Georgetown and Madisonville Branches.

Train No. 7 between Longview Jct. and Palestine.

Train No. 7 between Hearne and San Antonio. (In addition to the provisions of order of this Commission dated December 21, 1906, said railroad company is also required to hold Train No. 7 at Milano Jct. until the arrival of G., C. & S. F. Train No. 15 when said No. 15 carries the through San Antonio equipment.)

St. Louis-Mexico Special Longview Jct. and Laredo.

2. Gulf, Colorado & Santa Fe Railway:

Train No. 18 between Galveston and Gainesville.

Train No. 17 between Gainesville and Cleburne.
Train No. 15 between Cleburne and Galveston.
Trains Nos. 67 and 68 between Cleburne and Paris.
Train No. 16 at Milano.

3. Missouri, Kansas & Texas Railway of Texas:

Trains Nos. 5 and 6 between Galveston and Denison.
Trains Nos. 205 and 206 between Hillsboro and Denison.
Trains Nos. 235 and 236 between San Antonio and Granger.
Trains Nos. 1 and 3 may be held at Hillsboro for Nos. 201 and 203.
Train No. 233 may be held at Granger for Train No. 3.
Train No. 243 may be held at Smithville for Train No. 3.

4. Galveston, Harrisburg & San Antonio Railway and Texas & New Orleans Railroad:

Trains Nos. 9 and 10 between Echo and El Paso.
The T. & N. O. R. R. Co. is exempted from the necessity,
6 in order to comply with the terms of this order, to make up trains to start from Echo on time when trains from eastern connections are late.

5. Texas & Pacific Railway:

Trains Nos. 5 and 6, between Toyah and Texarkana.
Trains Nos. 104 and 107 between Texarkana and Longview Jct.
St. Louis Mexico Special between Texarkana and Longview Jct.

6. St. Louis Southwestern Railway of Texas:

Trains Nos. 1 and 2 between Waco and Texarkana.
Trains Nos. 101 and 102 between Fort Worth and Mt. Pleasant.

7. Paris & Great Northern Railroad:

Trains Nos. 5 and 6 between Arthur and Paris.

8. St. Louis, San Francisco & Texas Railway:

Trains Nos. 9 and 10 between Fort Worth and Denison.

9. Chicago, Rock Island & Gulf Railway:

Trains Nos. 11 and 12 between Dallas and Ringgold.
Trains Nos. 43 and 44 between Texhoma and Bravo.

10. El Paso Southwestern Railway:

All trains.

11. El Paso & Northeastern Railway:

All trains.

12. Rio Grande & El Paso Railway:

All trains.

13. Fort Worth & Denver City Railway:
Trains Nos. 1 and 2 between Fort Worth and Texline.

This order shall take effect February 25, 1907.

ALLISON MAYFIELD, *Chairman;*
L. J. STOREY,
O. B. COLQUITT,
Commissioners.

Attest:
E. R. McLEAN, *Secretary.*

I hereby certify that the above is a true and correct copy of
7 Passenger Circular No. 18, this day adopted by the Railroad Commission of Texas. Given under my hand and the seal of the Railroad Commission of Texas, at the City of Austin, this the 23rd day of February, 1907.

E. R. McLEAN, *Secretary.*"

6. Plaintiff further alleges that thereafter on the 18th day of March, 1907, said Railroad Commission of Texas, amended said Passenger Circular No. 18 and entered, adopted and promulgated Passenger Circular No. 20, as follows:

"Office of Railroad Commission of Texas.

Passenger Circular No. 20.

Amending Passenger Circular No. 18.

AUSTIN, TEXAS, March 18, 1907.

In approval of application presented to this Commission by the railway companies interested, and in pursuance of notice given in Hearing No. 692, it is hereby ordered that Passenger Circular No. 18, issued by this Commission on February 23, 1907, be amended by making the following changes in and additions to Rule 2 and Exceptions thereto:

1. Cancel Exception No. 8 applying to the St. Louis, San Francisco & Texas Railway.

2. Amend Exception No. 4, G. H. & S. A.—T. & N. O., by adding thereto the following:

All trains on Eagle Pass branch.

3. Add Exception No. 14 as follows:

14. Texas Midland Railroad.

Train No. 5 may be held one hour at Paris for Frisco Train No. 3.

4. Add exception No. 15 as follows:

15. Weatherford, Mineral Wells & Northwestern Railway:

Trains Nos. 9 and 25 between Weatherford and Mineral Wells.

8 5. Add the word "express" after the word "passengers" mail and baggage," as they appear in Rule 2.

6. Amend Exception No. 1 I. & G. N. R. R., by adding the following:

Train No. 10 may be held thirty minutes at San Antonio.

7. Amend Exception No. 1 I. & G. N. R. R., by canceling the reference to Train No. 7, between Hearne and San Antonio, and substituting the following:

Train No. 7 between Hearne and San Antonio.

(In addition to the provisions of order of this Commission dated December 21, 1906, said railroad company is also required to hold Train No. 7 at Milano Jct. until the arrival of G. C. & S. F. Train No. 15 when said No. 15 carries the through San Antonio equipment, but only when advised by the G. C. & S. F. Ry. Co. that said No. 15 is less than one hour late, which said information is hereby required by said G. C. & S. F. Ry. Co. Effective midnight March 18, 1907.)

This order shall take effect at once, and will cancel Passenger Circular No. 19, issued March 6, 1907.

ALLISON MAYFIELD, *Chairman;*
L. J. STOREY,
O. B. COLQUITT,
Commissioners.

Attest:
E. R. McLEAN, *Secretary.*

I hereby certify that the above is a true and correct copy of Passenger Circular No. 20, this day adopted by the Railroad Commission of Texas.

Given under my hand and the seal of the Railroad Commission of Texas, at the City of Austin, this the 18th day of March, 1907.

E. R. McLEAN, *Secretary.*"

9 7. That thereafter on the 3rd day of January, 1908, said Railroad Commission of Texas, further amended said Passenger Circular No. 18, and entered, adopted and promulgated its Passenger Circular No. 48, as follows:

"Office of Railroad Commission of Texas.

Passenger Circular No. 48.

Amended Passenger Circular No. 18.

AUSTIN, TEXAS, January 3, 1908.

It is ordered by the Railroad Commission of Texas that Passenger Circular No. 18, issued by this Commission, effective February 25, 1907, and containing rules and regulations governing the operation of passenger trains, be amended by cancelling that portion of Rule 2 thereof reading as follows:

"If, at the expiration of said thirty minutes, connecting trains are in sight a reasonable time, in addition to said thirty minutes, will be allowed in which to make the connection."

And substituting therefor the following:

'If, at the expiration of said thirty minutes, connecting trains are in sight, ten minutes, in addition to said thirty minutes, will be allowed in which to make the connection.

This order shall take effect January 10, 1908.

ALLISON MAYFIELD, *Chairman;*
L. J. STOREY,
O. B. COLQUITT,
Commissioners.

Attest:
E. R. McLEAN, *Secretary.*

I hereby certify that the above is a true and correct copy of Passenger Circular No. 48, this day adopted by the Railroad Commission of Texas. Given under my hand and the seal of the Railroad Commission of Texas, at the City of Austin, this the 3rd day of January, 1908.

E. R. McLEAN, *Secretary.*"

10 8. Plaintiff further alleges that the exceptions to Rule 2 of Passenger Circular No. 18 have been frequently amended and added to by the Railroad Commission of Texas, but that defendant's said Passenger Trains No. 9 and No. 209, or either of them, do not come within any of the exceptions to said Rule No. 2 of said Passenger Circular No. 18, or to any of the exceptions since added in any of the orders of said Railroad Commission contained in any of the circulars issued by it.

9. Plaintiff further alleges that said Passenger Circular No. 18, as amended by said Passenger Circular No. 20 and by said Passenger Circular No. 48 was in full force and effect during the period of time from September 8th, 1910, to November 8th, 1910, both inclusive.

10. Plaintiff further alleges that from the 8th day of September, 1910, to the 8th day of November, 1910, and including both of said dates, defendant's said passenger train No. 9 was, by defendant's published and advertised schedule, due to daily arrive at, and depart from said regular stations at Denison, Dallas, Hillsboro, Granger and Austin on defendant's said line of railroad as follows: Leave Denison at 6:25 o'clock A. M., Arrive at Dallas at 9:15 o'clock A. M. and depart therefrom at 9:40 o'clock A. M.; Arrive at Hillsboro at 11:45 o'clock A. M. and depart therefrom at 11:55 o'clock A. M.; Arrive at Granger at 2:50 o'clock P. M. and depart therefrom at 3:15 o'clock P. M. and to arrive at Austin at 4:55 P. M. and depart therefrom at 5:00 o'clock P. M.; that defendant is required under the law and under the said orders of the Railroad Commission of Texas above set out to start its said passenger train No. 9 from the point of its origin in accordance with said advertised schedule as above alleged, and to conform the running of said train to said published and advertised schedule as to the arrival and departure of said train at said station- of Denison, Dallas,

Hillsboro, Granger and Austin and the several other stations
11 on and along its said line of railroad, but that defendant is authorized to hold said train not to exceed thirty minutes at the point of origin and at junction points with other lines to make connection with trains on such other lines, and to hold said train at such points at the expiration of said thirty minutes, ten minutes longer if such connecting trains are in sight, and where connecting trains arrive within said time above allowed, the defendant is permitted a reasonable time in addition to that above provided for for the transfer of passengers, mail, express and baggage, but where connecting trains are reliably reported to be more than thirty minutes late, no wait is authorized or permitted.

11. Plaintiff further alleges that from and including the 8th day of September, 1910, to and including the 8th day of November, 1910, defendant's said passenger train No. 209, was by defendant's published and advertised schedule due to arrive and depart daily from said regular stations at Denison, Whitesboro, Fort Worth and Hillsboro on defendant's said line of railroad as follows: Leave Denison at 6:25 o'clock A. M.; to arrive at Whitesboro at 7:10; o'clock A. M. and depart therefrom at 7:15 o'clock A. M.; arrive at Fort Worth at 9:30 o'clock A. M.; and depart therefrom at 10:00 o'clock A. M. and arrive at Hillsboro at 11:45 o'clock A. M.; that the defendant is required under the law and under the said orders of the Railroad Commission above set out to start said Passenger Train No. 209 from the point of its origin in accordance with said published and advertised schedule as above alleged, and to conform the running of said train to the said published schedule as to the arrival and departure of said train at all of said stations of Denison, Whitesboro, Fort Worth and Hillsboro, and the several other stations on and along said line, but that the defendant is authorized to hold said train not to exceed thirty minutes at the point of origin and at junction points with other lines in order to make connections with trains, on such other lines entering said stations and to hold said train at such points, at the expira-
12 tion of said thirty minutes, ten minutes longer if such connecting trains are in sight, and where connecting trains arrive within the time above allowed, the defendant is permitted a reasonable time in addition to that above provided for for the transfer of passengers, mail, express and baggage, but where connecting trains are reliably reported to be more than thirty minutes late, no wait is authorized or permitted.

12. Plaintiff further alleges that notwithstanding the laws of the State and the legal orders of the Railroad Commission of Texas made, entered and promulgated, as aforesaid, during the period of time from and including September 8th, 1910, to and including November 8th, 1910, the defendant has wilfully failed and refused to obey the provisions of said passenger circular No. 18, as amended by said passenger circular No. 20, and said Passenger Circular No. 48, in that it has wilfully failed and refused to operate its said train No. 9, scheduled to leave daily the station of Denison at 6:25 o'clock A. M. and to arrive at Dallas at 9:15 o'clock A. M.

and depart therefrom daily at 9:40 o'clock A. M. and to arrive at Hillsboro daily at 11:45 o'clock A. M. and to depart therefrom at 11:55 o'clock A. M., and to arrive at Granger daily at 2:50 o'clock P. M. and depart therefrom at 3:15 o'clock P. M., and to arrive at Austin daily at 4:55 o'clock P. M. and depart therefrom at 5:00 o'clock P. M., in accordance with the requirements of said passenger circular No. 18 and amendments thereto as above alleged and plaintiff specifically alleges that on the several days and dates hereinafter alleged said train No. 9 arrived at and departed from said regular stations later than defendant's said published and advertised schedule for said train as follows:

(1) That on September 8, 1910, said train No. 9 left said station at Denison 50 minutes late, arrived at Dallas one hour and 5 minutes late, left Dallas 1 hour and 5 minutes late, arrived at Hillsboro 1 hour late, left Hillsboro 1 hour and 7 minutes late, arrived at Granger 1 hour and 20 minutes late, left Granger 1 hour
13 and 23 minutes late, arrived at Austin 1 hour and 25 minutes late, and left Austin 1 hour and 25 minutes late.

(2) That on September 9th, 1910, said Train No. 9, left Hillsboro 32 minutes late, arrived at Granger 55 minutes late, left Granger 40 minutes late, arrived at Austin 35 minutes late and left Austin 35 minutes late.

(3) That on September 10, 1910, said train No. 9 left Denison 55 minutes late, arrived at Dallas 1 hour and 10 minutes late, left Dallas 1 hour and 5 minutes late, arrived at Hillsboro 55 minutes late, left Hillsboro 1 hour and 2 minutes late, arrived at Granger 1 hour and 20 minutes late, left Granger 1 hour and 10 minutes late, arrived at Austin 1 hour and 10 minutes late, and left Austin 1 hour and 10 minutes late.

(4) That on September 11, 1910, said Train No. 9 arrived at Dallas 35 minutes late, left Dallas 35 minutes late, arrived at Hillsboro 40 minutes late, left Hillsboro 30 minutes late arrived at Granger 1 hour and 25 minutes late, left Granger 1 hour and 30 minutes late, arrived at Austin 1 hour and 30 minutes late;

(5) That on September 13, 1910, said train No. 9 left Denison one hour and 15 minutes late, arrive- at Dallas one hour and 25 minutes late, left Dallas one hour and 20 minutes late, arrived at Hillsboro one hour and 15 minutes late, left Hillsboro one hour and 25 minutes late, arrived at Granger one hour and 30 minutes late, left Granger one hour and 20 minutes late; arrived at Austin one hour and 20 minutes late, left Austin one hour and 20 minutes late.

(6) That on September 14, 1910, said Train No. 9, arrived at Granger 48 minutes late, left Granger 35 minutes late.

(7) That on September 15, 1910, said Train No. 9 arrived at Granger 50 minutes late, left Granger 50 minutes late, arrived at Austin 50 minutes late, left Austin 50 minutes late.

(8) That on September 16, 1910, said Train No. 9 arrived at Dallas 37 minutes late, left Dallas 32 minutes late, left Hills-
14 boro 37 minutes late, arrived at Granger 53 minutes late, left Granger 40 minutes late, arrived at Austin 40 minutes late left Austin 40 minutes late.

(9) That on September 17, 1910, said Train No. 9 left Denison 35 minutes late, arrived at Dallas 40 minutes late, left Dallas 35 minutes late, arrived at Hillsboro 40 minutes late, left Hillsboro 40 minutes late, arrived at Granger one hour late, left Granger 50 minutes late, arrived at Austin one hour late, left Austin one hour late.

(10) That on September 19, 1910, said Train No. 9 arrived at Austin 35 minutes late, left Austin 35 minutes late.

(11) That on September 20, 1910, said train No. 9 left Hillsboro 37 minutes late, arrived at Granger 55 minutes late, left Granger 40 minutes late, arrived at Austin 50 minutes late left Austin 50 minutes late.

(12) That on September 21, 1910, said Train No. 9 left Denison 44 minutes late, arrived at Dallas 52 minutes late, left Dallas 50 minutes late, arrived at Hillsboro 48 minutes late, left Hillsboro 57 minutes late, arrived at Granger one hour and 5 minutes late, left Granger 50 minutes late, arrived at Austin one hour and 5 minutes late, left Austin one hour and 5 minutes late.

(13) That on September 22, 1910, said Train No. 9 left Hillsboro 31 minutes late, arrived at Granger 50 minutes late, left Granger 45 minutes late, arrived at Austin 50 minutes late, left Austin 50 minutes late.

(14) That on September 23, 1910, said Train No. 9 arrived at Dallas 35 minutes late, left Dallas 43 minutes late, arrived at Hillsboro 55 minutes late, left Hillsboro one hour and 5 minutes late, arrived at Granger one hour and 25 minutes late, left Granger one hour and 25 minutes late, arrived at Austin one hour and 20 minutes late, left Austin one hour and 30 minutes late.

15 (15) That on September 24, 1910, said Train No. 9 left Denison 45 minutes late, arrived at Dallas one hour and 10 minutes late, left Dallas one hour and 10 minutes late, arrived at Hillsboro one hour and 3 minutes late, left Hillsboro one hour and 6 minutes late, arrived at Granger one hour and 35 minutes late, left Granger one hour and 25 minutes late, arrived at Austin one hour and 20 minutes late, left Austin one hour and 25 minutes late.

(16) That on September 26, 1910, said Train No. 9 left Hillsboro 32 minutes late, arrived at Granger 55 minutes late, left Granger 50 minutes late, arrived at Austin one hour late, left Austin one hour and 5 minutes late.

(17) That on September 27, 1910, said Train No. 9 left Denison one hour and 10 minutes late, arrived at Dallas one hour and 10 minutes late, left Dallas one hour and ten minutes late, arrived at Hillsboro one hour and 5 minutes late, left Hillsboro one hour and 34 minutes late, arrived at Granger one hour and 30 minutes late, left Granger one hour and 25 minutes late, arrived at Austin one hour and 25 minutes late, left Austin one hour and 55 minutes late.

(18) That on September 29, 1910, said Train No. 9 arrived at Granger 45 minutes late, arrived at Austin 35 minutes late, left Austin 35 minutes late.

(19) That on September 30, 1910, said Train No. 9 arrived at Hillsboro one hour and 10 minutes late, left Hillsboro one hour and 10 minutes late, arrived at Granger one hour and 25 minutes late, left Granger one hour and 15 minutes late, arrived at Austin one hour and 10 minutes late, left Austin one hour and 15 minutes late.

(20) That on October 1, 1910, said Train No. 9 arrived at Dallas 45 minutes late, left Dallas 45 minutes late, arrived at Hillsboro five hours late, left Hillsboro five hours and 45 minutes late, arrived at Granger five hours and 55 minutes late, left Granger five hours and 50 minutes late, arrived at Austin five hours and 55 minutes late, left Austin six hours late.

(21) That on October 2, 1910, said Train No. 9 arrived at Granger 45 minutes late.

(22) That on October 7, 1910, said Train No. 9 arrived at Granger 50 minutes late, left Granger 40 minutes late, arrived at Austin 32 minutes late, left Austin 35 minutes late.

(23) That on October 9, 1910, said Train No. 9 left Denison 40 minutes late, arrived at Dallas 45 minutes late, left Dallas 45 minutes late, arrived at Hillsboro 45 minutes late, left Hillsboro one hour and 5 minutes late, arrived at Granger one hour and 25 minutes late, left Granger one hour and 15 minutes late, arrived at Austin one hour and 10 minutes late, left Austin one hour and 10 minutes late.

(24) That on October 10, 1910, said Train No. 9 left Denison 35 minutes late, arrived at Dallas 40 minutes late, left Dallas 40 minutes late, arrived at Hillsboro 35 minutes late, left Hillsboro 37 minutes late, arrived at Granger one hour and 5 minutes late, left Granger one hour late, arrived at Austin one hour late, left Austin one hour and 10 minutes late.

(25) That on October 12, 1910, said Train No. 9, arrived at Dallas 40 minutes late, left Dallas 40 minutes late, arrived at Hillsboro 45 minutes late, left Hillsboro 55 minutes late, arrived at Granger one hour and 20 minutes late, left Granger one hour and 5 minutes late, arrived at Austin one hour late, left Austin one hour and 5 minutes late.

(26) That on October 13, 1910, said Train No. 9, left Denison 55 minutes late, arrived at Dallas one hour and 10 minutes late, left Dallas one hour and 10 minutes late, arrived at Hillsboro one hour and 15 minutes late, left Hillsboro one hour and 15 minutes late, arrived at Granger one hour and forty minutes late, left Granger one hour and 35 minutes late, arrived at Austin one hour and 40 minutes late, left Austin one hour and 40 minutes late.

(27) That on October 15, 1910, said Train No. 9 left Denison two hours and 50 minutes late, arrived at Dallas two hours and 50 minutes late, left Dallas two hours and 50 minutes late, arrived at Hillsboro two hours and 50 minutes late, left Hillsboro two hours and 50 minutes late, arrived at Granger two hours and 35 minutes late, left Granger two hours and 25 minutes late, arrived at Austin

two hours and 25 minutes late, left Austin two hours and 25 minutes late.

(28) That on October 16, 1910, said Train No. 9 arrived at Dallas one hour and 10 minutes late, left Dallas one hour and 10 minutes late, arrived at Hillsboro one hour late, left Hillsboro one hour late, arrived at Granger one hour and 30 minutes late, left Granger one hour and 20 minutes late, arrived at Austin one hour and 8 minutes late, left Austin one hour and 8 minutes late.

(29) That on October 17, 1910, said Train No. 9 arrived at Dallas 33 minutes late, left Dallas 33 minutes late, arrived at Hillsboro 42 minutes late, left Hillsboro 42 minutes late arrived at Granger one hour late, left Granger 45 minutes late, arrived at Austin 45 minutes late, left Austin 45 minutes late.

(30) That on October 18, 1910, said Train No. 9 arrived at Hillsboro 40 minutes late, left Hillsboro 45 minutes late, arrived at Granger one hour and 30 minutes late, left Granger one hour and 20 minutes late, arrived at Austin one hour and 15 minutes late, left Austin one hour and 15 minutes late.

(31) That on October 19, 1910, said Train No. 9, left Denison one hour and 25 minutes late, arrived at Dallas one hour and 27 minutes late, left Dallas one hour and 20 minutes late, arrived at Hillsboro one hour and 25 minutes late, left Hillsboro three hours and 15 minutes late, arrived at Granger three hours and 20
18 minutes late, left Granger three hours and 10 minutes late, arrived at Austin three hours and 5 minutes late, left Austin three hours and 20 minutes late.

(32) That on October 20, 1910, said Train No. 9 left Denison one hour and 30 minutes late, arrived at Dallas one hour and 32 minutes late, left Dallas one hour and 30 minutes late, arrived at Hillsboro one hour and 52 minutes late, left Hillsboro two hours and 17 minutes late, arrived at Granger two hours and 27 minutes late, left Granger two hours and 25 minutes late, arrived at Austin two hours and 25 minutes late, left Austin two hours and 40 minutes late.

(33) That on October 21, 1910, said Train No. 9 arrived at Hillsboro 25 minutes late, left Hillsboro 41 minutes late, arrived at Granger one hour and 10 minutes late, left Granger one hour and 15 minutes late, arrived at Austin one hour and 15 minutes late, left Austin one hour and 15 minutes late.

(34) That on October 22, 1910, said Train No. 9 left Denison one hour and 30 minutes late, arrived at Dallas one hour and 53 minutes late, left Dallas one hour and 50 minutes late, arrived at Hillsboro one hour and 45 minutes late, left Hillsboro two hours and 2 minutes late, arrived at Granger two hours and 15 minutes late, left Granger two hours and 5 minutes late, arrived at Austin two hours and 5 minutes late, left Austin two hours and 5 minutes late.

(35) That on October 23, 1910, said Train No. 9 left Denison one hour and 25 minutes late, arrived at Dallas one hour and 50 minutes late, left Dallas one hour and 50 minutes late, arrived at Hillsboro one hour and 45 minutes late, left Hillsboro one hour

and 55 minutes late, arrived at Granger one hour and 55 minutes late, left Granger one hour and 45 minutes late, arrived at Austin one hour and 30 minutes late, left Austin one hour and 30 minutes late.

19 (35) That on October 24, 1910, said Train No. 9 arrived at Dallas 40 minutes late, left Dallas 40 minutes late, left Hillsboro 47 minutes late, arrived at Granger 55 minutes late, left Granger 40 minutes late, arrived at Austin 45 minutes late left Austin 45 minutes late.

(37) That on October 26, 1910, said Train No. 9 arrived at Granger 50 minutes late, left Granger 35 minutes late.

(38) That on October 27, 1910, said Train No. 9 arrived at Dallas 50 minutes late, left Dallas 45 minutes late, arrived at Hillsboro 50 minutes late, left Hillsboro 50 minutes late, arrived at Granger one hour and 10 minutes late, left Granger one hour and 10 minutes late, arrived at Austin one hour and 5 minutes late, left Austin one hour and 5 minutes late.

(39) That on October 28, 1910, said Train No. 9 left Denison 57 minutes late, arrived at Dallas one hour and 10 minutes late, left Dallas one hour and 15 minutes late, arrived at Hillsboro one hour and 10 minutes late, left Hillsboro one hour and 23 minutes late, arrived at Granger one hour and 45 minutes late, left Granger one hour and 35 minutes late, arrived at Austin one hour and 20 minutes late, left Austin one hour and 30 minutes late.

(40) That on October 29, 1910, said Train No. 9, arrived at Dallas 35 minutes late, left Dallas 35 minutes late, arrived at Hillsboro 35 minutes late, left Hillsboro 30 minutes late arrived at Granger one hour late, left Granger 50 minutes late, arrived at Austin 55 minutes late, left Austin 55 minues late.

(41) That on October 30, 1910, said Train No. 9 left Denison one hour and 25 minutes late, arrived at Dallas one hour and 55 minutes late, left Dallas one hour and 55 minutes late, arrived at Hillsboro one hour and 50 minutes late, left Hillsboro two hours late, arrived at Granger two hours and 18 minutes late, left

20 Granger two hours and 5 minutes late, arrived at Austin two hours and 10 minutes late, left Austin two hours and 10 minutes late.

(42) That on October 31, 1910, said Train No. 9 arrived at Hillsboro 37 minutes late, left Hillsboro 40 minutes late, arrived at Granger one hour and 6 minutes late, left Granger 50 minutes late, arrived at Austin one hour late, left Austin one hour late.

(43) That on November 1, 1910, said Train No. 9 left Denison one hour and 45 minutes late, arrived at Dallas two hours and 12 minutes late, left Dallas two hours and 7 minutes late, arrived at Hillsboro two hours and 23 minutes late, left Hillsboro two hours and 35 minutes late, arrived at Granger two hours and 30 minutes late, left Granger two hours and 25 minutes late, arrived at Austin two hours and 20 minutes late, left Austin two hours and 35 minutes late.

(44) That on November 2, 1910, said Train No. 9 left Denison one hour and 30 minutes late, arrived at Dallas two hours late, left

Dallas two hours and 38 minutes late, arrived at Hillsboro five hours and 24 minutes late, left Hillsboro five hours and 47 minutes late, arrived at Granger six hours late, left Granger six hours late, arrived at Austin six hours and 5 minutes late, left Austin six hours and 5 minutes late.

(45) That on November 3, 1910, said Train No. 9 left Denison 44 minutes late, arrived at Dallas one hour late, left Dallas one hour late, arrived at Hillsboro one hour and 25 minutes late, left Hillsboro one hour and 37 minutes late, arrived at Granger two hours and 5 minutes late, left Granger one hour and 55 minutes late, arrived at Austin one hour and 55 minutes late, left Austin two hours and 5 minutes late.

(46) That on November 4, 1910, said Train No. 9 left Denison 45 minutes late, arrived at Dallas one hour and 5 minutes late, left Dallas one hour and 10 minutes late, arrived at Hillsboro one hour and 13 minutes late, left Hillsboro one hour and 17 minutes
21 late, arrived at Granger one hour and 50 minutes late, left Granger one hour and 45 minutes late, arrived at Austin one hour and 43 minutes late, left Austin one hour and 43 minutes late.

(47) That on November 5, 1910, said Train No. 9 left Denison one hour late, arrived at Dallas one hour and 10 minutes late, left Dallas one hour and 10 minutes late, arrived at Hillsboro one hour late, left Hillsboro one hour and 12 minutes late arrived at Granger 1 hour and 12 minutes late, left Granger one hour and 15 minutes late, arrived at Austin one hour and 15 minutes late, left Austin one hour and 15 minutes late.

(48) That on November 6, 1910, said Train No. 9 left Denison two hours and 15 minutes late, arrived at Dallas two hours and 20 minutes late, left Dallas two hours and 21 minutes late, arrived at Hillsboro two hours and 15 minutes late, left Hillsboro two hours and 47 minutes late, arrived at Granger three hours and 40 minutes late, left Granger three hours and 30 minutes late, arrived at Austin three hours and 30 minutes late, left Austin three hours and 45 minutes late.

(49) That on November 7, 1910, said Train No. 9 left Denison 50 minutes late, arrived at Dallas one hour and 20 minutes late, left Dallas one hour and 20 minutes late, arrived at Hillsboro one hour and 13 minutes late, left Hillsboro one hour and 15 minutes late, arrived at Granger one hour and 30 minutes late, left Granger one hour and 23 minutes late, arrived at Austin one hour and 25 minutes late, left Austin one hour and 25 minutes late.

(50) That on November 8, 1910, said Train No. 9 arrived at Dallas 45 minutes late, left Dallas 45 minutes late, arrived at Hillsboro 40 minutes late, left Hillsboro 40 minutes late, arriving at Granger one hour and 10 minutes late, left Granger one hour late, arrived at Austin one hour and 5 minutes late, left Austin one hour and 5 minutes late.

22 13. Plaintiff further alleges that notwithstanding the laws of this State and the legal orders of the Railroad Commission of Texas made, entered and promulgated, as aforesaid, dur-

ing the period of time from and including the 8th day of September, 1910, to and including the 8th day of November, 1910, the defendant has wilfully failed and refused to observe and obey the provisions of said passenger circular No. 18 as amended by said passenger circular No. 20, and said passenger circular No. 48, in that it has wilfully failed and refused to operate its said train No. 209 scheduled daily to leave Denison at 6:25 o'clock A. M. and to arrive at Whitesboro at 7:10 o'clock A. M. and depart therefrom at 7:15 o'clock A. M., and to arrive at Fort Worth at 9:35 A. M. and depart therefrom at 10:00 o'clock A. M. and to arrive at Hillsboro at 11:45 o'clock A. M. in accordance with the requirements of said passenger circular No. 18, and amendments thereto as hereinbefore alleged, and plaintiff specifically alleges that on the several days and dates hereinafter alleged said trains No. 209 arrived at and departed from said regular stations later than defendant's said published and advertised schedule for said train as follows:

(1) That on September 8, 1910, said train left Denison 40 minutes late, arrived at Whitesboro 35 minutes late, left Whitesboro 35 minutes late, arrived at Fort Worth 40 minutes late, left Fort Worth 40 minutes late and arrived at Hillsboro 40 minutes late.

(2) That on September 10, 1910, said Train No. 209 left Denison 55 minutes late, arrived at Whitesboro 50 minutes late, left Whitesboro 50 minutes late, arrived at Fort Worth one hour late left Forth Worth one hour late, arrived at Hillsboro 50 minutes late.

(3) That on September 13, 1910, said Train No. 209 left Denison one hour *late* 20 minutes late, arrived at Whitesboro one hour and 15 minutes late, left Whitesboro one hour and 15 minutes late, arrived at Fort Worth one hour and 10 minutes late, left
23 Fort Worth one hour and 10 minutes late, arrived at Hillsboro one hour and 10 minutes late.

(4) That on September 17, 1910, said Train No. 209, left Denison 35 minutes late.

(5) That on September 21, 1910, said Train No. 209 left Denison 48 minutes late, arrived at Whitesboro 40 minutes late, left Whitesboro 40 minutes late, arrived at Forth Worth 35 minutes late, left Fort Worth 35 minutes late.

(6) That on September 24, 1910, said Train No. 209 left Denison 45 minutes late, arrived at Whitesboro 45 minutes late, left Whitesboro 45 minutes late, arrived at Fort Worth 55 minutes late, left Fort Worth 55 minutes late, arrived at Hillsboro 45 minutes late.

(7) That on September 27, 1910, said Train No. 209 left Denison one hour and 10 minutes late, arrived at Whitesboro one hour and 8 minutes late, left Whitesboro one hour and 8 minutes late, arrived at Fort Worth one hour late, left Fort Worth 55 minutes late, arrived at Hillsboro 55 minutes late.

(8) That on September 30, 1910, said train No. 209 left Denison 35 minutes late.

(9) That on October 9, 1910, said Train No. 209 left Denison 37 minutes late, arrived at Whitesboro 35 minutes late, left Whitesboro

35 minutes late, arrived at Fort Worth one hour late left Fort Worth one hour late, arrived at Hillsboro one hour late.

(10) That on October 10, 1910, said Train No. 209 left Denison 37 minutes late, arrived at Whitesboro 35 minutes late, left Whitesboro 35 minutes late, arrived at Fort Worth 35 minutes late.

(11) That on October 13, 1910, said Train No. 209 left Denison one hour late, arrived at Whitesboro one hour late, left Whitesboro one hour late, arrived at Fort Worth 45 minutes late, left Fort Worth 45 minutes late, arrived at Hillsboro 45 minutes late.

24 (12) That on October 15, 1910, said Train No. 209 left Denison two hours and 50 minutes late, arrived at Whitesboro two hours and 45 minutes late, left Whitesboro two hours and 45 minutes late, arrived at Fort Worth two hours and 35 minutes late, left Fort Worth two hours and 35 minutes late, arrived at Hillsboro two hours and 35 minutes late.

(13) That on October 19, 1910, said Train No. 209 left Denison one hour and 25 minutes late, arrived at Whitesboro one hour and 25 minutes late, left Whitesboro one hour and 25 minutes late, arrived at Fort Worth three hours and 5 minutes late left Fort Worth three hours and 5 minutes late, arrived at Hillsboro three hours and 5 minutes late.

(14) That on October 20, 1910, said Train No. 209 left Denison one hour and 25 minutes late, arrived at Whitesboro one hour and 30 minutes late, left Whitesboro one hour and 30 minutes late, arrived at Fort Worth two hours late, left Fort Worth one hour and 55 minutes late, arrived at Hillsboro one hour and 45 minutes late.

(15) That on October 21, 1910, said train No. 209 left Whitesboro 40 minutes late, arrived at Fort Worth 35 minutes late, left Fort Worth 40 minutes late, arrived at Hillsboro 40 minutes late.

(16) That on October 22, 1910, said Train No. 209 left Denison one hour and 30 minutes late, arrived at Whitesboro one hour and 30 minutes late, left Whitesboro one hour and 30 minutes late, arrived at Forth Worth one hour and 40 minutes late, left Fort Worth one hour and 40 minutes late, arrived at Hillsboro one hour and 35 minutes late.

(17) That on October 23, 1910, said Train No. 209 left Denison one hour and 25 minutes late, arrived at Whitesboro one hour and 20 minutes late, left Whitesboro one hour and 25 minutes late, arrived at Fort Worth one hour and 30 minutes late, left Fort
25 Worth one hour and 30 minutes late, arrived at Hillsboro one hour and 30 minutes late.

(18) That on October 24, 1910, said Train No. 209 arrived at Fort Worth 35 minutes late, left Fort Worth 35 minutes late.

(19) That on October 27, 1910, said Train No. 209 left Denison 35 minutes late, arrived at Whitesboro 35 minutes late, left Whitesboro 35 minutes late, arrived at Fort Worth 40 minutes late, left Fort Worth 40 minutes late.

(20) That on October 28, 1910, said Train No. 209 left Denison one hour late, arrived at Whitesboro one hour late, left Whitesboro one hour late, arrived at Fort Worth one hour and 15 minutes late,

left Fort Worth one hour and 15 minutes late, arrived at Hillsboro one hour and 15 minutes late.

(21) That on October 29, 1910, said Train No. 209 left Whitesboro 44 minutes late, arrived at Fort Worth 40 minutes late, left Fort Worth 40 minutes late, arrived at Hillsboro 40 minutes late.

(22) That on October 30, 1910, said Train No. 209 left Denison one hour and 25 minutes late, arrived at Whitesboro one hour and 35 minutes late, left Whitesboro one hour and 25 minutes late, arrived at Fort Worth one hour and 45 minutes late, left Fort Worth one hour and 40 minutes late, arrived at Hillsboro one hour and 50 minutes late.

(23) That on October 31, 1910, said Train No. 209 left Denison 35 minutes late.

(24) That on November 1, 1910, said Train No. 209 left Denison one hour and 40 minutes late, arrived at Whitesboro one hour and 40 minutes late, left Whitesboro one hour and 40 minutes late, arrived at Fort Worth one hour and 50 minutes late, left Fort Worth one hour and 50 minutes late, arrived at Hillsboro one hour and 35 minutes late.

(25) That on November 2, 1910, said Train No. 209 left Denison one hour and 31 minutes late, arrived at Whitesboro one hour and 30 minutes late, left Whitesboro one hour and 30 minutes late, arrived at Forth Worth one hour and 25 minutes late, left Fort Worth one hour and 15 minutes late, arrived at Hillsboro one hour and 15 minutes late.

(26) That on November 3, 1910, said train No. 209 left Denison 40 minutes late, arrived at Whitesboro 40 minutes late, left Whitesboro 45 minutes late, arrived at Fort Worth one hour late, left Fort Worth 55 minutes late, arrived at Hillsboro one hour late.

(27) That on November 4, 1910, said Train No. 209 left Denison 40 minutes late, arrived at Whitesboro 38 minutes late, left Whitesboro 38 minutes late, arrived at Forth Worth 37 minutes late, left *Worth* Worth 45 minutes late, arrived at Hillsboro 35 minutes late.

(28) That on November 5, 1910, said Train No. 209 left Denison one hour and 5 minutes late, arrived at Whitesboro one hour and 5 minutes late, left Whitesboro one hour and 5 minutes late, arrived at Fort Worth one hour and 5 minutes late, left Fort Worth one hour late, arrived at Hillsboro 58 minutes late.

(29) That on November 6, 1910, said Train No. 209 left Denison two hours and 20 minutes late, arrived at Whitesboro two hours and 15 minutes late, left Whitesboro two hours and 15 minutes late, arrived at Fort Worth two hours and 10 minutes late, left Fort Worth two hours and 15 minutes late, arrived at Hillsboro two hours and 30 minutes late.

(3-) That on November 7, 1910, said Train No. 209 left Denison one hour late, arrived at Whitesboro one hour late, left Whitesboro one hour late, arrived at Fort Worth one hour and 5 minutes late, left Fort Worth one hour and 5 minutes late, arrived at Hillsboro 55 minutes late.

14. Plaintiff further alleges that the hereinbefore alleged rules and regulations, and said passenger circular No. 18 and amendments

thereof as aforesaid, so made, adopted and promulgated by the Railroad Commission of Texas, are reasonable regulations of de-
27 fendant railroad company and are within the reasonable exercise of the powers and authority of said Railroad Commission of Texas.

15. Plaintiff further alleges that the failure and refusal of defendant to observe and obey said rules, regulations and orders of said Railroad Commission of Texas and said passenger circular No. 18 and amendments thereto and its failure and refusal to operate its said train Nos. 9 and 209 on the dates above specified, in accordance with its said published and advertised schedule, and the arrival at and departu-e from the several stations aforesaid of said trains Nos. 9 and 209 later *then* indicated and provided in said published and advertised schedule as hereinbefore specifically alleged, was not due to unavoidable accidents thereto en route, nor to holding said trains at origin or at junction points with other lines to make connections with trains on such other lines, in accordance with the terms and conditions and under the restrictions set forth and contained in said passenger circular No. 18 and amendments thereto as hereinbefore alleged nor to any other cause provided for in said circular or amendments, but the same are due to causes other than those specified and permitted under the provisions of said passenger circular No. 18 and the said amendments thereof as aforesaid. That the failure and refusal of said company to operate said trains in accordance with the provisions and requirements of said passenger circular No. 18 as hereinabove set forth, is a wilful failure and refusal on the part of said railway company to observe and be governed by the orders, rules, and regulations adopted and prescribed by said Railroad Commission, and is a wilful violation of the laws of this State and subjects and renders such railway company liable to the payment of the penalties prescribed by law; also by reason of the premises, defendant has become liable to the State of Texas in the sum of five thousand
28 dollars for each and every day, for each of its said trains Nos. 9 and 209, on each of its said lines of railroad, as above set out, and for each of said eighty times, that it has violated said order of said Railroad Commission of Texas and the laws of this state in the total sum of Four Hundred Thousand Dollars.

16. Premises considered, plaintiff prays that the defendant be cited in terms of the law to appear and answer this petition and upon hearing hereof, plaintiff have judgment against defendant for the sum of Four Hundred Thousand Dollars and for costs of suit and for such other relief as it may be entitled to, either in law or in equity.

JEWEL P. LIGHTFOOT,
Attorney General;
JAMES D. WALTHALL,
E. B. ROBERTSON,
Assistant Attorney General,
Attorneys for Plaintiff.

(Endorsed:) #28684. State of Texas vs. Missouri, Kansas & Texas Ry. Co. of Texas. Plaintiff's Original Petition (Suit for pen-

alties) Filed in District Court Travis County, Texas, 53 Judicial District, Jan. 5th, 1912. D. J. Pickle, Clerk, by O. P. Bonner, Deputy.

Answer.

Filed June 18, 1912.

In the District Court of Travis County, Fifth-third Judicial District.

No. 28684.

STATE OF TEXAS
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

Now comes The Missouri, Kansas & Texas Railway Com-
29 pany of Texas, defendant in the above entitled and numbered cause, and for answer to the original petition filed herein, says:

1. Defendant demurs to the petition and says it is insufficient in law, and presents no cause of action, in this, that the order of the Railroad Commission of Texas upon which the suit is based was made without authority, and is therefore of no force or effect, and no penalty can be recovered for a violation thereof, and of this defendant prays the judgment of the court.

ALEX S. COKE,
FISET & McCLENDON,
A. H. McKNIGHT,
Attorneys for Defendant.

2. Defendant admits the truth of the allegations contained in paragraph- 1, 2 and 3 of the petition; that the Railroad Commission made, entered and adopted Passenger Circular No. 18 and amendments thereto as alleged in Paragraphs 5, 6, and 7 of the petition; that the allegations of fact contained in paragraphs 8 and 9 of the petition are true (but defendant does not admit the legality of Passenger Circular No. 18 or of any amendment thereto), that during the period of time named in paragraphs 10 and 11 of the petition its passenger trains Nos. 9 and 209 were, by its published and advertised schedule therefor, respectively due daily to arrive at and depart from the respective stations in said paragraphs mentioned, at the times therein alleged; that its Train No. 9 arrived at and departed from the several stations mentioned in Paragraph 12 of the petition the number of hours and minutes later than the advertised and published schedule therefor on the respective dates in said paragraph mentioned as alleged, and that its Train No. 209 arrived at and departed from the several stations mentioned in Paragraph 13 of the petition the number of hours and minutes later than the advertised and published schedule therefor on the respective dates in said paragraph mentioned, as therein alleged. Defendant denies all and
30 singular the other allegations in the petition contained, and

demands strict proof thereof, and of this puts itself upon the country.

ALEX S. COKE,
FISET & McCLENDON,
A. H. McKNIGHT,
Attorneys for Defendant.

3. For special answer herein defendant says that it is and was during all the time mentioned in the petition a common carrier by railroad engaged in the transportation of both passengers and property between points in the State of Texas and between points in said State and points in Oklahoma, Kansas, Missouri, and various other states of the United States and foreign countries, and that as such common carrier it is and was subject to the Act to Regulate Commerce approved February 4, 1887, and the acts amendatory thereof and supplementary thereto. Its line of railroad connects with a line of Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma State line, about five miles north of Denison, Grayson County, Texas, the two lines together constituting a through route for the transportation of passengers and property between Galveston and San Antonio, Texas, on the south, and St. Louis and Kansas City, Missouri, on the North, and intermediate stations and points beyond. Defendant and said Missouri, Kansas & Texas Railway Company now operate and did during all the times mentioned in the petition operate through passenger trains over said joint route, one of said through trains being popularly called the Katy Limited and being designated by defendant and said Railway Company as Train No. 9, except the part thereof operated between Denison and Hillsboro via Fort Worth, which is called Train No. 209. This train was inaugurated on or about the — day of September, A. D. 1909, and has since been continuously operated and has at all times been advertised, published and scheduled as such through train. A corresponding northbound train, also popularly called the Katy Limited and designated by defendant and said *said* Railway Company as Train No.
31 10 except the part thereof operated between Hillsboro and Denison via Fort Worth, which is called Train No. 210, has also since the said date been daily operated by them. Train No. 9 has at all times originated in two sections, one at St. Louis and the other at Kansas City, which two sections have been combined into a single train at Parsons and thence operated over the line of said Missouri, Kansas & Texas Railway Company to the Texas-Oklahoma State line, where delivery thereof and of the passengers thereon was made by the said Railway Company to defendant, and from said point said train has been operated by defendant to Denison, Texas. At Denison during all of this time the said train has been divided into two sections, one of which has been operated via Dallas, Hillsboro, Granger and Austin, to San Antonio, and the other from Denison via Fort Worth to Hillsboro, where it connected with the first mentioned section. The said train from Denison to San Antonio via Dallas is designated by defendant as Train No. 9 and the section thereof from Denison to Hillsboro via Fort Worth as Train No. 209,

these different numbers being adopted for convenience in operation. The said trains Nos. 9 and 209 from Denison South so designated by defendant are the Trains called Nos. 9 and 209 in the petition. This said through train from St. Louis and Kansas City to San Antonio, including the section or branch thereof operated via Fort Worth, was inaugurated and equipped and has at all times since its inauguration been operated primarily for the benefit and accommodation of interstate passengers, although passengers between points in Texas have been carried thereon when boarding the same at regular stops therefor with transportation to other regular stops, and the same equipment has during all this time been used to operate the train both in the State of Texas and outside the State of Texas, engines of course being changed at regular division terminals, as is customary in the operation of all trains. By reason of the foregoing facts,
32 defendant, avers, the said Train No. 9, including the section or branch thereof known as Train No. 209, and the cars and equipment used therein, have at all times been and now are facilities for the operation of a through route between points in Texas and points in other States, and, as such, they have been and are subject to the provisions of the aforesaid Act to Regulate Commerce, and especially to the provisions of Sections 1 and 15 thereof as amended by an Act approved June 18, 1910, and said train and the cars and other equipment used therein and the operation thereof have at all times been and now are subject to the jurisdiction of and to regulation by the Interstate Commerce Commission, and not to the jurisdiction of or to regulation by the Railroad Commission of Texas. Passenger Circular No. 18 therefore does not apply to Trains Nos. 9 and 209, or, if construed as applying to them, is void.

4. Further answering herein defendant says that it and the Missouri, Kansas & Texas Railway Company daily handle, and did daily handle during the period of time from September 8, 1910, to November 8, 1910, a large number of passengers from points outside the State of Texas to points in the State of Texas and to points beyond on the aforesaid through Train No. 9, about 115 such passengers daily being delivered by the Missouri, Kansas & Texas Railway Company to defendant on said train at the Texas-Oklahoma State line, and thence carried by defendant to Denison, Texas, and to points beyond. It was necessary, defendant avers, to operate the said train South of Denison via both Dallas and Fort Worth, as it had advertised to the public it would do, or else to inconvenience, annoy and otherwise trouble daily the said large number of passengers delivered to defendant by the Missouri, Kansas & Texas Railway Company, as aforesaid. Defendant had no control over and nothing to do with the operation of said through Train No. 9 until said train was delivered to it by the Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma State line,
33 and manifestly it could not start the train from said point until delivery thereof at said point by the Missouri, Kansas & Texas Railway Company, nor could it operate the train South of Denison until it arrived thereat. Therefore, when the Missouri, Kansas & Texas Railway Company delivered said train to defendant

at the Texas-Oklahoma State line more than thirty minutes late defendant was unable to cause said train to arrive at or to depart from Denison in accordance with its advertised and published schedule therefor, and to comply with said Passenger Circular No. 18 of the Railroad Commission of Texas it would necessarily upon such occasion have had to run special trains from Denison to Hillsboro via Fort Worth and to San Antonio via Dallas, to do which would have cost it large sums of money, to-wit: about $30,000.00. This expense would have had to be incurred or the passengers delivered to defendant by the Missouri, Kansas & Texas Railway Company would have been delayed at Denison to await the departure of its next train. To have so delayed said passengers, defendant avers, would have subjected it to damages, and to have run said special trains would have imposed upon it an unnecessary burden, for during all of said time defendant operated daily between Denison and Granger via both Dallas and Fort Worth three passenger trains each way daily, and between Granger and San Antonio two passenger trains each way daily, said trains being exclusive of and not including Trains Nos. 9 and 10 and 209 and 210. In addition to this, defendant during said period operated between Denison and Whitesboro still another passenger train each way daily, and the Texas & Pacific Railway Company operated between Whitesboro and Fort Worth a passenger train each way daily upon which defendant's tickets were good for transportation, and there was in operation between Denison and Dallas a trolley line running trains hourly for the accommodation of passengers, and the Houston & Texas Central Railroad Company operated two or more passenger trains each way daily between Denison and Dallas, and
34 other train service was provided between said points by other railway companies. The said trains so operated by defendant, exclusive of Trains Nos. 9 and 10 and 209 and 210, furnished adequate accommodations for the transportation of all local passengers between Denison and points South thereof on defendant's line and for all other passenger traffic originating at Denison and destined to points beyond the lines of defendant. Said trains also furnished adequate accommodations for all local traffic offering at stations between Denison and San Antonio or at San Antonio, and, in addition to this, the aforesaid service by the troll-y line, the railway companies mentioned and other railway companies was provided. Because of these facts, defendant avers, said Passenger Circular No. 18 does not apply to defendant's Trains Nos. 9 and 209, or, if it be construed as applying to them, it is void in this: that it is a regulation of, a burden upon, and an interference with interstate commerce in contravention of Subdivision 3, Section 8, Article 1 of the Constitution of the United States.

5. Further specially answering herein defendant avers that, from September 8, 1910, to November 8, 1910, it provided and operated sufficient trains for the accommodation of local passenger traffic offering at Denison and San Antonio, and all intermediate points between, as is set forth in detail in Subdivision 4 hereof, and, therefore, that the Railroad Commission of Texas had no power or au-

thority to require it to run or operate other or additional trains for the accommodation of said traffic, and while defendant denies that Passenger Circular No. 18 can be construed as requiring it to furnish additional train service for the accommodation of this traffic it avers that if it be construed as requiring this when the aforesaid Train No. 9 was more than thirty minutes late in reaching Denison the said circular is void and of no effect for lack of authority on the part of the Commission to make or promulgate it.

35 6. Further answering herein defendant says its trains Nos. 9 and 209 were inaugurated and the operation thereof before or after Passenger circular No. 18 was made and adopted. Therefore said circular has no application to said trains, or if construed as applying to them is void because in contravention of Sec. 1, Art. 19 of the Texas Constitution and Sec. 1 of the 14th Amendment to the Constitution of the United States and especially the due process of law clauses thereof.

7. Further answering herein defendant avers that, if the said Passenger Circular No. 18 applies or can be held to apply to its Trains Nos. 9 and 209, which it expressly denies, in the operation of said trains its violation of said Circular, if it has violated the same, has been a continuous violation thereof, and there has in law been but a single violation, and only one penalty, if any, can be recovered.

8. Further specially answering defendant avers, that its Trains Nos. 9 and 209, so called are but different sections of the same train; that No. 9 arriving at Denison is broken into two parts or formed into two sections, one of which goes to Hillsboro via Dallas and the other to Hillsboro via Fort Worth, and both sections are at Hillsboro reunited and formed into a single train, which proceeds southward through Austin to San Antonio, and therefore, if defendant has violated said Passenger Circular No. 18 by reason of its failure to run said Trains Nos. 9 and 209 out of Denison within thirty minutes of the scheduled time therefor, but one penalty in any event can be recovered for the two and not a single penalty for each, all of which facts, together with the matters mentioned in Subdivisions 3, 4, 5, 6 & 7 hereof, defendant is ready to verify.

8. Wherefore, defendant prays that it go hence without day, and recover from the plaintiff its costs.

ALEX S. COKE,
FISET & McCLENDON,
A. H. McKNIGHT,

36 *Attorneys for Defendant, the Missouri, Kansas & Texas Railway Company of Texas.*

(Endorsed:) #28684. The State of Texas vs. M. K. & T. R. R. Co. of Tex. Answer. Filed June 18, 1912. D. J. Pickle, Clerk, by O. P. Bonner, Deputy.

28684.

THE STATE OF TEXAS
vs.
M., K. & T. RY CO. OF TEXAS.

Judgment.

June 17th, 1912.

On this 17th day of June, 1912, this cause was regularly called for trial. The parties, plaintiff and defendant appeared by their respective Attorneys and announced ready for trial; the defendant's demurrer having been duly submitted to the Court and being fully considered was by the Court overruled, to which ruling of the court the defendant in open Court duly excepted. A jury not having been demanded by either party, the issues of fact and law were submitted to the Court. The Court after hearing the evidence and argument of Counsel took said case under advisement, and on this the 27th day of June, 1912, made his findings and entered his judgment in favor of the plaintiff.

It is therefore, considered, ordered and adjudged by the Court that the plaintiff, the State of Texas, do have and recover of and from the defendant, The Missouri, Kansas & Texas Railway Company of Texas the sum of Fourteen Thousand Dollars, together with all costs of this suit, for all of which execution may issue, to which judgment the defendant in open Court excepts, and asks for conclusions of law and facts.

37 *Findings of Facts & Conclusions of Law.*

Filed June 29, 1912.

In the District Court of Travis County, 53rd Judicial District.

No. 28684.

THE STATE OF TEXAS
vs.
THE M., K. & T. RY. CO. OF TEXAS.

Complying with the request of the Defendant, the Court now here prepares and files the following findings of fact and conclusions of law, to-wit:

Findings of Fact.

1.

During the period of time from September 8th to November 8th, 1910, both dates inclusive, the Defendant owned and operated a line of railroad extending from the City of Denison to the City of San

Antonio, Texas, passing through the cities of Dallas, Hillsboro, Granger and Austin, all of which cities were regular stations on said line and that during said period Defendant operated a passenger train, known as No. 9, over said line from Denison to San Antonio, which was by Defendant's published and advertised schedule due to daily leave Denison at 6:25 o'clock A. M., and that during said period of time defendant also owned and operated another line of railroad extending from Denison through the cities of Whitesboro and Ft. Worth, and to the City of Hillsboro, all of which cities were regular stations on said line, and that Defendant operated a passenger train, known as No. 209, over said line of railroad from the City of Denison through Whitesboro and Ft. Worth to Hillsboro where said train No. 209 was scheduled to make connection with said train No. 9 above set out; said Train No. 209 was by Defendant's regular published schedule due to daily leave Denison at 6:25 o'clock A. M.; Defendant's said line of railroad also
38 extends North of Denison, Texas, to the Texas State line at Red River, a distance of five miles, but there is no station on said line North of Denison.

2.

That on February 23, 1907, the Railroad Commission of Texas made, entered and adopted an order known as Passenger Circular No. 18 which is correctly copied in paragraph 5 of Plaintiff's Original Petition and contains Rule 2, which is as follows:

"Rule 2. Each and every railroad company operating a railroad in this State, shall start its passenger trains from points of origin in accordance with advertised schedule, and said trains, except from unavoidable accidents thereto enroute shall observe and conform to the published schedule as to arrival and departure at the several stations on the line; provided that trains may be held not to exceed thirty (30) minutes at origin or at junction points with other lines to make connection with trains on such other lines. If at the expiration of said thirty minutes, connecting trains are in sight a reasonable time, in addition to said thirty minutes, will be allowed in which to make the connection. Where connecting trains arrive within the time above allowed, a reasonable time, in addition to that above provided for will be allowed for transfer of passengers, mail, express, and baggage. Where connections are reliably reported to be more than 30 minutes late no wait will be made."

That thereafter on January 3, 1908, the Railroad Commission of Texas duly passed an order amending said Passenger Circular No. 18, as set out in paragraph 7 of Plaintiff's Petition which amendment is as follows:

"It is ordered by the Railroad Commission of Texas that Passenger Circular No. 18 issued by this Commission, effective February 25, 1907, and containing rules and regulations governing the operation of passenger trains, be amended by cancelling that portion of Rule 2 thereof reading as follows:

39 "If, at the expiration of said thirty minutes, connecting trains are in sight a reasonable time, in addition to said thirty minutes, will be allowed in which to make the connection."

"And substituting therefor the following:

"'If, at the expiration of said thirty minutes connecting trains are in sight, ten minutes, in addition to said thirty minutes, will be allowed in which to make the connection.'"

"This order shall take effect January 10, 1908."

3.

That said Rule 2 of Passenger Circular No. 18 aforesaid has never been set aside by the Railroad Commission, but was in full force and effect during the period of time hereinbefore named and that said trains Nos. 9 and 209 above mentioned were subject to none of the exceptions named in said orders.

4.

That the railroad of defendant connects with the railroad of Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma state line, about five miles North of Denison, Grayson County, Texas, which point of connection, for convenience, will hereinafter be called Red River. That by an agreement between defendant and said Missouri, Kansas & Texas Railway Company certain trains, among others the train called by them No. 9 are operated from the North to Denison and are interchanged between the two at Red River, but there is no change in either crew or equipment at Red River, the trains between Red River and Denison consisting of the same equipment and being operated by the same crews of which they consist and by which they are operated upon the railroad of Missouri, Kansas & Texas Railway Company to Red River; that said Train No. 9 operated over the lines of both Companies, which, for convenience, will hereinafter be called No. 9, from the North, originates in two sections, one at St. Louis and the other at Kansas City,

40 and both of said sections are run over the tracks of the Missouri, Kansas & Texas Railway Company to Parsons, Kansas, where they are consolidated into one train, which runs South over its tracks to Red River, from which point to Denison it is operated over the tracks of the defendant. While said train and the crew operating the same are in Oklahoma they are under the jurisdiction and control of the Missouri, Kansas & Texas Railway Company, and while in Texas they are under the jurisdiction and control of the defendant.

That Train No. 9 from the North was usually composed of about ten cars, some of which, when the train reached Denison were placed in defendant's Train No. 9 and carried South via Dallas to Hillsboro, the remainder being placed in defendant's Train No. 209 at Denison and run South via Forth Worth to Hillsboro at which last named place the cars so operated via Dallas and via Fort Worth were again combined into a single train, which was operated

over defendant's line to and through the City of Austin. Defendant's Train No. 209 usually carried about three of the cars contained in No. 9 from the North, and the remainder of the cars in No. 9 from the North were usually placed in defendant's Train No. 9. Other cars were picked up at Denison and made a part of defendant's Trains Nos. 9 and 209 from time to time as necessary. Two of the sleepers contained in No. 9 from the North were usually operated via Fort Worth and the remaining three via Dallas. Train No. 209 usually carried about six cars from Denison to Hillsboro, a distance of 151 miles, and Train No. 9 usually carried about seven cars from Denison to Hillsboro, a distance of 172 miles, one or two of which, were generally set out at Dallas. From Hillsboro to Granger, a distance of 95 miles, defendant's Train No. 9 usually consisted of 9 cars, and from Granger to Austin, a distance of 47 miles, of 7 cars. The cars set out at Granger were carried to Houston and returned, being picked up at Granger again on North bound trips. The equipment of No. 9 from the North usually consisted of two mail, baggage and express cars, three passenger coaches
41 and five sleepers; of defendant's Train No. 209 of two mail, baggage and express cars, two passenger coaches and two sleepers; of defendant's Train No. 9 between Denison and Hillsboro of two mail, baggage and express cars, two passenger coaches and three sleepers, and of Train No. 9 from Hillsboro to Granger of two mail, baggage and express cars, three passenger coaches and four sleepers. From Granger to and through Austin the equipment of No. 9 consisted of two mail, baggage and express cars, two passenger coaches, and three sleepers.

That the crews of No. 9 from the North did not come South of Denison, new crews being secured there for defendant's Trains Nos. 9 and 209, and new engines were secured at Denison for said trains.

5.

That Train No. 9 from the North was, during the period in controversy, due daily to arrive at Denison at 6:10 o'clock A. M. according to the published and advertised schedule therefor. That on the following dates the said train arrived at Denison later than its published schedule time, as follows:

September	8th,	34 minutes.
"	9th,	18 minutes.
"	10th,	47 minutes.
"	11th,	18 minutes.
"	13th,	1 hour and 9 minutes.
"	14th,	10 minutes.
"	15th,	10 minutes.
"	16th,	27 minutes.
"	17th,	32 minutes.
"	20th,	28 minutes.
"	21st,	40 minutes.
"	23rd,	17 minutes.
"	24th,	45 minutes.

42

September	26th,	19 minutes.
"	27th,	1 hour.
"	29th,	5 minutes.
"	30th,	30 minutes.
October	1st,	13 minutes.
"	3rd,	3 minutes.
"	9th,	35 minutes.
"	10th,	35 minutes.
"	12th,	25 minutes.
"	13th,	45 minutes.
"	15th,	2 hours and 40 minutes.
"	16th,	14 minutes.
"	17th,	15 minutes.
"	19th,	1 hour and 15 minutes.
"	20th,	1 hour and 17 minutes.
"	21st,	27 minutes.
"	22nd,	1 hour and 18 minutes.
"	23rd,	1 hour and 20 minutes.
"	24th,	25 minutes.
"	26th,	23 minutes.
"	27th,	21 minutes.
"	28th,	45 minutes.
"	29th,	28 minutes.
"	30th,	1 hour and 15 minutes.
"	31st,	20 minutes.
November	1st,	1 hour and 35 minutes.
"	2nd,	1 hour.
"	3rd,	44 minutes.
"	4th,	35 minutes.
"	5th,	55 minutes.
"	6th,	2 hours and 10 minutes.
"	7th,	50 minutes.
"	8th,	30 minutes.

43 That on each of said dates it was reported to defendant's train dispatcher and agent at Denison on or before it was due to arrive by its schedule that said Train No. 9 from the North was late and would arrive late at Denison, as set forth above, except on September 21st, when it was reported that the train would reach Denison 20 minutes late and it in fact arrived 40 minutes late, account a loss 20 minutes between Red River and Denison, due to the failure of the engine to steam, and on October 30th, when it was reported that the train would arrive 1 hour and 5 minutes late, but it in fact arrived 1 hour and 15 minutes late, account a loss of 10 minutes between Red River and Denison, due to the fact that the engine pulling the train was new and stiff, and therefor- unable to handle the train.

All dates mentioned in this and succeeding paragraph are for the year 1910.

That during the period of time in controversy defendant's train No. 9 actually departed from Denison, Texas, on the following dates

the number of minutes later than its published and advertised schedule for such departure as follows:

September 8th, 50 minutes.
" 9th, 20 minutes.
" 10th, 55 minutes.
" 11th, 25 minutes.
" 13th, 1 hour and 15 minutes.
" 14th, 8 minutes.
" 15th, 15 minutes.
" 16th, 27 minutes.
" 17th, 35 minutes.
" 20th, 30 minutes.
" 21st, 44 minutes.
" 23rd, 20 minutes.
" 24th, 45 minutes.
" 26th, 20 minutes.

44

September 27th, 1 hour and ten minutes.
" 29th, 8 minutes.
" 30th, 30 minutes.
October 1st, 12 minutes.
" 2nd, 10 minutes.
" 7th, 5 minutes.
" 9th, 40 minutes.
" 10th, 35 minutes.
" 12th, 25 minutes.
" 13th, 55 minutes.
" 15th, 2 hours and fifty minutes.
" 16th, 15 minutes.
" 17th, 15 minutes.
" 18th, 5 minutes.
" 19th, 1 hour and twenty-five minutes.
" 20th, 1 hour and thirty minutes.
" 21st, twenty-five minutes.
" 22nd, one hour and thirty minutes.
" 23rd, one hour and twenty-five minutes.
" 24th, thirty minutes.
" 26th, 23 minutes.
" 27th, 20 minutes.
" 28th, 57 minutes.
" 29th, 30 minutes.
" 30th, 1 hour and twenty-five minutes.
" 31st, 20 minutes.
November 1st, 1 hour and forty-five minutes.
" 2nd, 1 hour and thirty minutes.
" 3rd, 44 minutes.
" 4th, 45 minutes.
" 5th, 1 hour.
" 6th, 2 hours and fifteeen minutes.
" 7th, 50 minutes.
" 8th, 30 minutes.

45 7.

That during the period of time in controversy defendant's train No. 209 actually departed from Denison, Texas, on the following dates the number of minutes later than its published and advertised schedule for such departure as follows:

September	8th,	40 minutes.
"	10th,	55 minutes.
"	13th,	1 hour and twenty minutes.
"	17th,	35 minutes.
"	21st,	48 minutes.
"	24th,	45 minutes.
"	27th,	1 hour and ten minutes.
"	30th,	35 minutes.
October	9th,	37 minutes.
"	10th,	37 minutes.
"	13th,	1 hour.
"	15th,	2 hours and fifty minutes.
"	19th,	1 hour and twenty-five minutes.
"	20th,	1 hour and twenty-five minutes.
"	21st,	27 minutes.
"	22nd,	1 hour and thirty minutes.
"	23rd,	1 hour and twenty-five minutes.
"	24th,	30 minutes.
"	27th,	35 minutes.
"	28th,	1 hour.
"	29th,	30 minutes.
"	30th,	1 hour and twenty-five minutes.
"	31st,	35 minutes.
November	1st,	1 hour and forty minutes.
"	2nd,	1 hour and thirty-one minutes.
"	3rd,	40 minutes.
"	4th,	40 minutes.
"	5th,	1 hour and five minutes.
"	6th,	2 hours and twenty minutes.
"	7th,	1 hour.

46 8.

That during said period of time said Train No. 9 of the M. K. & T. Ry. Co. from the North actually arrived at Denison, Texas, the number of minutes late on the dates following:

September	8th,	34 minutes.
"	9th,	18 minutes.
"	10th,	47 minutes.
"	11th,	18 minutes.
"	13th,	1 hour and nine minutes.
"	14th,	10 minutes.

September	15th,	10 minutes.
"	16th,	27 minutes.
"	17th,	32 minutes.
"	19th,	20 minutes.
"	20th,	28 minutes.
"	21st,	40 minutes.
"	23rd,	17 minutes.
"	24th,	45 minutes.
"	26th,	19 minutes.
"	27th,	1 hour.
"	29th,	5 minutes.
"	30th,	30 minutes.
October	1st,	13 minutes.
"	2nd,	10 minutes.
"	7th,	3 minutes.
"	9th,	35 minutes.
"	10th,	35 minutes.
"	12th,	25 minutes.
"	13th,	45 minutes.
"	15th,	2 hours and forty minutes.
"	16th,	14 minutes.
"	17th,	15 minutes.
"	18th,	5 minutes.
"	19th,	1 hour and fifteen minutes.
"	20th,	1 hour and seventeen minutes.

47

October	21st,	27 minutes.
"	22nd,	1 hour and eighteen minutes.
"	23rd,	1 hour and twenty minutes.
"	24th,	25 minutes.
"	26th,	23 minutes.
"	27th,	21 minutes.
"	28th,	45 minutes.
"	29th,	28 minutes.
"	30th,	1 hour and fifteen minutes.
"	31st,	20 minutes.
November	1st,	1 hour and thirty-five minutes.
"	2nd,	1 hour.
"	3rd,	44 minutes.
"	4th,	35 minutes.
"	5th,	55 minutes.
"	6th,	2 hours and ten minutes.
"	7th,	50 minutes.
"	8th,	30 minutes.

9.

That on October 19, 1910, defendant's said Train No. 9 arrived at Hillsboro one hour and twenty-five minutes late and was held at Hillsboro one hour and fifty minutes longer waiting for defendant's

Train No. 209 to arrive from Ft. Worth; that on or before defendant's said Train No. 9 arrived at Hillsboro it was reported to defendant's agent at Hillsboro that said Train No. 209 would not arrive at Hillsboro until one hour and fifty minutes later than said Train No. 9 actually arrived at Hillsboro on said date and that on said date said Train No. 209 did actually arrive at Hillsboro one hour and fifty minutes later than said Train No. 9 arrived at Hilisboro on said date.

10.

That by "departing late" and "delay" as used herein is meant time consumed or lost over and above that allowed or shown by the
48 advertised and published schedule.

11.

That Train No. 209 was regularly scheduled to stop at the following stations on defendant's said line of railroad; Whitesboro, Pilot Point, Denton, Fort Worth, Egan, Alvarado and Hillsboro; that Train No. 9 was regularly scheduled to stop at Greenville, Rockwall, Garland, Dallas, Lancaster, Waxahachie, Hillsboro, Waco, Temple, Granger, Georgetown, Austin, San Marcos, New Braunfels and San Antonio; that said Trains Nos. 9 and 209 also stopped at other stations on defendant's line of railroad in order to let off any passengers holding tickets from St. Louis or Kansas City to such station and also to let off passengers at stations in cases of emergency, such as sickness or death; that at all stations where defendant's said Trains Nos. 9 and 209 are regularly scheduled to stop they take on and let off passengers for the several other stations along its line in Texas where said trains are scheduled to stop.

12.

That in addition to said Train No. 209, during the period of time in controversy, the defendant also ran over its line from Denison, Texas, by Fort Worth to Hillsboro three other passenger trains daily known as No. 1, No. 3 and No. 205; that said Train No. 1 was scheduled to leave Denison at 1:55 p. m. and arrive at Hillsboro at 9:00 P. M. and stop at all intermediate stations on defendant's said line; that said Train No. 3 was scheduled to leave Denison at 3:55 A. M. and to arrive at Hillsboro at 10:00 A. M., stopping at all intermediate stations that said train No. 205 was scheduled to leave Denison at 5:10 o'clock p. m., and to arrive at Hillsboro at 10:30 p. m., stopping at Pottsboro, Whitesboro, Pilot Point, Denton, Fort Worth, Alvarado, Grandview, Itasca and Hillsboro, and that during said period of time defendant also operated over said line a corresponding number and kind of northbound trains from Hillsboro to
49 Denison. That said trains Nos. 1 and three were purely local trains and ran on a slow schedule.

13.

That during the period of time in controversy defendant, in addition to the foregoing trains, operated its local Passenger Train No. 11 from Denison to Wichita Falls, and its local Passenger Train No. 12 from Wichita Falls to Denison; that said Train No. 11 was scheduled to leave Denison at 7:00 A. M. and to arrive at Whitesboro at 7:55 A. M., stopping at all intermediate stations; that said Train No. 12 was scheduled to leave Whitesboro at 6:00 P. M., and arrive at Denison at 7:00 P. M. stopping at all intermediate stations; that the said Trains were operated over the same track as defendant's Trains Nos. 209, 1, 3 and 205. That during said time the Texas & Pacific Railway Company operated its Passenger Trains Nos. 31 and 32 between Whitesboro and Fort Worth over the aforesaid joint track, using at Fort Worth and Whitesboro and all intermediate points the depots used by the defendant; that T. & P. Passenger Train No. 31 was scheduled to leave Whitesboro at 2:20 p. m., and arrive at Fort Worth at 5:05 p. m., that T. & P. Passenger Train No. 32 was scheduled to leave Fort Worth at 9:05 A. M. and to arrive at Whitesboro at 11:40 A. M. and that the tickets of defendant were good for passage on said T. & P. trains.

14.

That during the period of time in controversy, in addition to Train No. 9, defendant also operated three other southbound passenger trains from Denison to Hillsboro by way of Dallas, known as Trains Nos. 5, 201 and 203; that said Train No. 5 was scheduled to leave Denison at 5:05 P. M. and to arrive at Hillsboro at 10:30 P. M. stopping at Bells, Whitewright, Celeste, Greenville, Rockwall, Garland, Dallas, Lancaster, Waxahachie and Hillsboro; that said train No. 201 was scheduled to leave Denison at 2:05 p. m. and to arrive at Hillsboro at 9:00 P. M. stopping at all regular stations; that said Train No. 203 was scheduled to leave Denison at 3:55 A. M. and to arrive at Hillsboro at 10:15 A. M. stopping at all regular stations. That said trains Nos. 201 and 203 were each purely local trains running on a slow schedule.

15.

That during the period of time in controversy, in addition to Train No. 9, defendant also operated three passenger trains from Hillsboro to Waco known as Trains Nos. 1, 3 and 5; that said Train No. 1 was scheduled to leave Hillsboro at 9:20 p. m. and to arrive at Waco at 10:35 p. m.; stopping at all regular stations; that said Train No. 3 was regularly scheduled to leave Hillsboro at 10:35 a. m., and to arrive at Waco at 11:50 a. m., stopping at all regular stations; that said Train No. 5 was scheduled to leave Hillsboro at 10:50 p. m. and to arrive at Waco at 11:50 p. m., making no intermediate stops; that said Trains Nos. 1, 3 and 5 are the same as Nos. 1, 3 and 5 men-

tioned in the last two preceding paragraphs after a consolidation with Trains Nos. 201, 203 and 205 at Hillsboro; that said Train No. 3 also continues south from Waco to Granger, leaving Waco at 11:59 a. m. and arriving at Granger at 2:30 p. m. stopping at all regular stations, and from Granger runs on south over another line of defendant's railroad to Houston; that said Train No. 5 also runs on south from Waco by Smithville to Galveston, leaving Waco at 11:55 p. m., stopping at Temple at 1:02 a. m., and Granger at 1:55 a. m., and continuing from Granger to Galveston over another line of defendant's railroad. All of said trains which stop at all regular stations are purely local trains running on slow schedule.

16.

That during said period of time in controversy defendant also operated another passenger train known as No. 7 from Waco by Granger and Smithville to Houston, leaving Waco at 6:00 o'clock a. m., arriving at Granger at 8:20 a. m., Smithville at 10:45 a. m. and arriving at Houston at 3:30 p. m., stopping at all regular stations, being a local train running on slow schedule.

51

17.

That during the period of time in controversy in addition to Train No. 9 defendant also operated two other southbound passenger trains from Granger through Austin to San Antonio known as Trains Nos. 231 and 235; that said Train No. 231 was scheduled to leave Granger at 8:30 a. m., making connection with No. 7 from Waco and arriving at Austin at 10:25 a. m. and departing therefrom at 11:55 a. m. and arriving at San Antonio at 3:25 p. m. stopping at all regular stations; that said Train No. 235 was scheduled to leave Granger at 2:35 A. M. carrying connection from No. 5 from the north arriving at Austin at 4:25 a. m. and at San Antonio at 7:30 a. m. stopping at Weir, Georgetown, Pflugerville, Sprinkle, Austin, San Marcos, New Braunfels and San Antonio; that during said period of time defendant also operated a corresponding number and kind of northbound trains over said line to Hillsboro; that said train No. 235 carried through to San Antonio two sleepers which it received at Granger from Train No. 5 from the north.

18.

That all of defendant's passenger trains carried passengers, mail, baggage and express.

19.

That defendant's Nos. 9 and 209 were inaugurated and put in service for the purpose of connecting at Denison, Texas, with the train No. 9 of the M. K. & T. Ry. Company from Kansas City and St. Louis, and that these trains of defendant carried both interstate and

intrastate passengers, but the evidence fails to disclose the proportional part of interstate and intrastate passengers carried by said trains during said period of time in controversy.

20.

That during the period of time in controversy the defendant could, at reasonable expense, have operated its said Trains Nos. 9
52 and 209 South from Denison in two sections, so as to comply with its published and advertised schedule for said train's arrival at its several stations south of Denison and still have cared for its interstate passengers arriving at Denison over the M. K. & T. Railway Company on its Train No. 9.

Conclusions of Law.

(1) The order of the Railroad Commission of Texas known as "Passenger Circular No. 18" containing said Rule 2 is valid.

(2) Said order of the Railroad Commission is not a regulation of interstate commerce nor is it an interference with or burden upon such commerce, but rather tends to facilitate both intrastate and interstate commerce and promotes the convenience of the traveling public.

(3) Whatever effect said order may have on interstate commerce is only incidental and then only on account of a violation thereof by defendant.

(4) The other passenger trains provided by defendant outside of trains Nos. 9 and 209 were not during the period of time in controversy adequate and sufficient to accommodate the local and intrastate passenger traffic on defendant's line of railroad.

(5) The evidence fails to show that during said period of time defendant had provided adequate facilities to accommodate the traveling public by providing sufficient other passenger trains and so arranging the schedule of the same for that purpose.

(6) Said trains Nos. 9 and 209 of defendant were not engaged solely in interstate commerce but both of said trains ran wholly within the State of Texas and their crews and a large part of their equipment were picked up at Denison and ran wholly within this State and a large part of the passengers carried on said trains were intrastate passengers.

(7) On the following named dates defendant wilfully disobeyed and violated said order of said Railroad Commission of Texas
53 by holding its train No. 9 at Denison more than 30 minutes after it was due to depart therefrom by its regular published and advertised schedule, for the purpose of making connection with the M. K. & T. Train No. 9 from the North, and when said last named train was, before defendant's train No. 9 was scheduled and due to depart from Denison, reliably reported to defendant's agent at Denison to be more than 30 minutes late, to-wit:

September 13th.
" 27th.
October 15th.
" 19th.
" 20th.
" 22nd.
" 23rd.
" 30th.
November 1st.
" 2nd.
" 5th.
" 6th.
" 7th.

(8) On October 19, 1910, defendant wilfully violated and disobeyed said order of said Railroad Commission of Texas by holding its train No. 9 at Hillsboro more than 30 minutes, to-wit: 1 hour and fifty minutes, after it was due to depart therefrom according to its regular published and advertised schedule, for the purpose of making connection with defendant's Train No. 209 which was reliably reported to defendant's agent at Hillsboro to be one hour and fifty minutes late thereat and which report was made and received by the time of the arrival at Hillsboro of said train No. 9.

(9) On the following named dated defendant wilfully violated and disobeyed said order of said Railroad Commission of Texas by holding its train No. 209 at Denison more than 30 minutes after it was due to depart therefrom according to its regular published and advertised schedule, for the purpose of making connection
54 with said M. K. & T. train No. 9 from the North and when said last named train was, before defendant's train No. 209 was scheduled and due to depart from Denison, reliably reported to defendant's agent at Denison to be more than 30 mintes late, to-wit:

September 13th.
" 27th.
October 13th.
" 19th.
" 20th.
" 22nd.
" 23rd.
" 30th.
November 1st.
" 2nd.
" 5th.
" 6th.
" 7th.

(10) None of the delays hereinbefore named as violations of the order of the Railroad Commission of Texas, were on account of unavoidable accident en route.

(11) For each of the fourteen violations of said order by train No. 9 as aforesaid, and for each of the fourteen violations by train

No. 209, as aforesaid, making an aggregate of 28 violations, I have assessed a penalty of Five Hundred Dollars, aggregating Fourteen Thousand Dollars and have entered judgment accordingly.

GEO. CALHOUN,
Judge 53rd District Court, Travis County, Texas.

(Endorsed:) No. 28684. The State of Texas vs. M. K. & T. Ry. Co. of Texas. Findings of Facts & Conclusions of Law. Filed June 29th, 1912. D. J. Pickle, Clerk, by S. A. Philquist, Deputy.

55 *Defendant's Motion for a New Trial.*

Filed June 29, 1912.

In the District Court of Travis County, 53rd Judicial District of Texas.

No. 28684.

THE STATE OF TEXAS
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

Comes now the defendant The Missouri, Kansas & Texas Railway Company of Texas, and respectfully moves the court to set aside the judgment heretofore rendered herein and to grant it a new trial of this case and all the issues therein, and as grounds for said motion said defendant avers the following:

(1) Because the court erred in overruling defendant's general demurrer to plaintiff's original petition.

(2) Because the court erred in overruling defendant's general demurrer to plaintiff's original petition, for the reason that Article 4494 of the Revised Statutes of Texas, upon which the order of the Railroad Commission herein sued upon is based, is not intended to and does not apply to interstate trains operated over two or more lines, but is simply intended to require railroad companies operating intrastate trains originating on their own lines and under their exclusive control, to have a published schedule therefor, and to operate the same in accordance therewith, and since the said order of the Railroad Commission cannot go beyond the Statute it must be construed as not applying to through interstate trains operated over two or more lines for if construed as applying to them, it is void.

(3) Because the court erred in overruling defendant's general demurrer to plaintiff's original petition, for the reason that the
56 order of the Railroad Commission upon which this suit is based is in substance but a restatement of the duties imposed by the Statute upon railroad companies and adds nothing whatever thereto; that under the statute the duty of the Railroad Commission is limited to correcting abuses and the only way it can correct an abuse with reference to the operation of trains under Article 4494 of the Revised Statutes of Texas is to have a hearing upon the sub-

ject, and upon the facts heard base its judgment, order or decree, requiring the railroad company to do or not to do some particular thing; for the violation of such an order, a penalty could be recovered, but no penalty can be recovered for the violation of a general order which simply restates the statutory duty and is not based upon any particular state of facts; that plaintiff's petition in this case shows that the order made the basis of this suit was general, and was not a judgment, order or decree based upon facts with reference to the operation of the train or trains involved, and no penalty whatever can be recovered for a failure to comply with its provisions.

(4) Because the Court erred in rendering judgment against this defendant, the evidence showing without contradiction that by agreement the Missouri, Kansas & Texas Railway Company, a Kansas corporation, and this Defendant, a Texas corporation, established and equipped a through route for the transportation of passengers, baggage, mail and express over their respective lines between the cities of St. Louis and Kansas City, in the State of Missouri, on the north, and the City of San Antonio, Texas, on the south, and that this defendant's trains Nos. 9 and 209 and 10 and 210 were and are facilities for and used in the operation of such through route, and governed & controlled by the following provisions of Section 1, of the Act to regulate commerce, as amended June 18th, 1910: "And the term transportation shall in-
57 clude cars and other vehicles and all instrumentalities and facilities of shipment of carriage, irrespective of ownership or of any contract express or implied, for the use thereof, and all services in connection with the receipt delivery, elevation, and transfer in transit, ventilation, refrigeration or icing or storage, and the handling of property transported; and it shall be the duty of every carrier, subject to the provisions of this act to provide and to establish through routes and just and reasonable rates applicable thereto and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein and for the operation of such through routes and providing for reasonable compensation to those entitled thereto; that because of this provision and the provisions of Section 15 of the Act which gave the interstate commerce commission authority to establish through routes and to make rules and regulations for the operation thereof, the said trains and the operation thereof, the same being through interstate trains primarily established and maintained for the benefit and convenience of interstate traffic, and almost exclusively devoted to such traffic, as shown by the evidence, are and were under the jurisdiction of the Interstate Commerce Commission, and not subject to regulation by the Railroad Commission of the State of Texas, and the said order of the Railroad Commission of Texas, upon which this suit is based, is an unwarrantable interference with interstate commerce, and imposes a burden thereon contrary to the provisions of the constitution of the United States, delegating to the Federal Congress power to regulate interstate and foreign commerce.

(5) Because the evidence shows that train Nos. 9 and 209 parts

of No. 9, running south into Texas from the State of Mis-
58 souri, Kansas and Oklahoma, (and their counterparts, Nos. 10 and 210, running north from & out of the State of Texas) were primarily established and equipped for the benefit and convenience, and for the transportation of, interstate traffic, to-wit: passengers, baggage mail and express, between St. Louis and Kansas City, Missouri, on the North and San Antonio, Texas, on the South, and intermediate points; that the equipment of such trains 9 and 209, consisting of baggage, mail and express cars, chair-cars and coaches, and standard Pullman sleepers, was and is run through from San Antonio, Texas, and other Texas points to St. Louis and Kansas City, in the State of Missouri, and thereupon run from such northern termini to the terminus in Texas & back to the Northern termini again and so on continuously; and that about eight per cent of the traffic on said trains 9 & 209, is and was interstate; that the said train Nos. 9 and 209 was and is a through interstate train and but parts and sections of a through continuous and interstate train designated No. 9, and operated from St. Louis and Kansas City, Missouri, through the States of Missouri, Kansas and Oklahoma, into Denison, Texas and points to the south thereof by the said Missouri, Kansas & Texas Railway Company and this defendant, the former operating said train on its own tracks and under its own and exclusive control, to the Texas-Oklahoma State line, commonly known as Red River, and there delivering the said train to this defendant, who owns and operates a line of railroad running south into Texas from the Texas-Oklahoma State line, as aforesaid, and this defendant operates the said train so delivered to it at the State line, into Denison and on to the south, and said train No. 9, at Denison being divided into two sections or parts, one designated 209 running south to Hillsboro, Texas, via Ft. Worth, and the other Section continuing under the same designation of No. 9, running via Dallas to the said town of Hillsboro, at which latter point said train No. 209 is again consolidated with said
59 train No. 9, and the latter thereupon proceeds south to its final destination, at San Antonio, Texas, as aforesaid; that defendant's local service outside of and independent of Nos. 9 and 209 has at all times been ample and sufficient for the needs of the public, and there has never been any necessity for increase therein. Because of these facts, the court erred in holding that defendant was subject to the penalties for which judgment was rendered against it, or any of them, for the reason that the order of the Railroad Commission of Texas, upon which said penalty and judgment are based, by reason of the facts aforesaid, is an interference with and an attempt to regulate interstate commerce, and is a burden upon such commerce, which is inhibited by the Constitution of the United States, which delegates to the Federal Congress the sole power to regulate interstate commerce, and foreign commerce.

(6) Because the facts set out in paragraph five, above which are now here referred to and prayed to be considered a part hereof, are established by the evidence and because the evidence in addition shows that all the violations made the basis of the judgment

herein (except one or two) grow out of delays at Denison, which delays were caused or occasioned by the failure of the Missouri, Kansas & Texas Railroad Company a Kansas corporation, with which this defendant connects at the Oklahoma-Texas State line as aforesaid, and over which this defendant has no control or authority whatever, to deliver to defendant the said through, interstate train No. 9, and the equipment provided as aforesaid by said companies for the operation thereof, at Red River, on said State line, on schedule time, so that this defendant might pull the same into Denison over its tracks and arrive there on schedule time, to-wit: 6:10 A. M. of each day, that the substance and effect of the Court's judgment is to penalize this defendant because of the failure of its said connecting carrier to deliver to it on time the said
60 train, and not because of any negligence or default on the part of this defendant, and if the order of the Railroad Commission herein sued on or the statute upon which the same is based are authority for such judgment, then both the said order and the said statute are void, in that they seek to control, regulate and burden interstate commerce, and because they are arbitrary unreasonable and unjust, as applied to the facts of this case, and deprive this defendant of its property without due process of law, and deny to it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

(7) Because the allegations of paragraphs 5 and 6 which are now here referred to and prayed to be considered a part of this paragraph are true and fully established by the evidence and because trains Nos. 9 and 209 mentioned in Plaintiff's Petition are parts of and a continuation of No. 9, due to arrive in Denison, Texas, at 6:10 A. M. daily, and because it is impossible for this defendant to operate the said train No. 9 south of Red River and 9 and 209 out of Denison until the same is delivered to it by its connecting carrier at Red River, or the Texas-Oklahoma line, therefore the order of the Railroad Commission herein sued on, if construed as applicable to such train, is null and void, and incapable of performance by this defendant, and the order of the Railroad Commission sought to be enforced under these circumstances, is arbitrary, unreasonable and unjust, and its enforcement as against this defendant would deprive it of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution, of the United States.

(8) Because the evidence in this case shows that this defendant by agreement with the Missouri, Kansas & Texas Railway Company is obligated to operate said train No. 9, delivered to it at the Texas-
Oklahoma State line as aforesaid, through the State of Texas,
61 to its southern terminus; that if the order of the Railroad Commission herein sued on has been correctly construed by this honorable court, it requires this defendant to run and operate, when the said train No. 9 is delivered to it more than 30 minutes late at Red River a special train from Denison to its southern terminus at San Antonio on the time and schedule of 9 and 209 and to leave said No. 9 from the North and the traffic thereon at Denison,

thereby in substance requiring this defendant to violate its contract and agreement with the Missouri, Kansas & Texas Railway Company with reference to the operation of said through train and to subject itself to loss and damage by reason thereof and said interstate traffic to delay, hinderance and inconvenience that the said order of the commission so construed is arbitrary, unjust and unreasonable, and impairs and practically destroys the contract and agreement existing between the defendant and the Missouri, Kansas and Texas Railway Company, for the operation of said through train contrary to the inhibition of the Constitution of the United States, which denies to any State or its governmental agencies the right to impair the obligation of a contract and interferes with and burdens interstate commerce contrary to the constitution of the U. S. conferring on Congress the power to control and regulate the same.

(9) Because of the said order of the Railroad Commission properly construed requires this defendant to run special a train when No. 9 is delivered to it thirty minutes late, as the court holds said order is a regulation of and a burden upon interstate commerce, because the evidence shows that many interstate passengers, and large quantities of mail, baggage and express, to-wit: about ten car loads thereof all told are handled on No. 9 daily, and tendered this defendant and delivered to it by the Missouri, Kansas and Texas Railway Company at the Oklahoma-Texas State line, and received by this defendant and hauled and transported by it over its line to Denison, and other points in the State of Texas; that it would be illegal impracticable and practically impossible to hold
62 this train and this traffic, to-wit, passenger, baggage, mail and express, until the schedule time of the departure of some subsequent train several hours later, and that in truth and in fact, the said No. 9 and 209 made up of and carrying said equipment received from the north, and the said passengers, baggage, mail and express thereon, would have to be run out of Denison as soon as practicable after arrival of No. 9 and through to their destination at San Antonio, and other points in Texas, notwithstanding the said special train had theretofore been run, out of Denison in accordance with the order herein sued on; that the cost of the equipment necessary for the operation of the said special train would be hundreds of thousands of dollars and the daily cost of the operation thereof would be many hundreds of dollars, all of which outlay and expense would be and is unnecessary and would be a total loss to this defendant and a direct burden imposed upon this defendant, because of its inability to get said through interstate train from its connection at the Texas-Oklahoma State line on schedule time; and its consequent inability and failure to run its interstate train 9 and 209 on schedule time; that this regulation and burden cannot lawfully be imposed by said statute or by the Railroad Commission acting thereunder, on interstate traffic, and is inhibited by the constitution of the United States, giving to Congress the right to regulate interstate commerce and the order of the Railroad Commission if properly construed by this honorable court to so operate

is arbitrary, unreasonable, unjust and void, as a deprivation of this defendant of its property, without due process of law.

(10) Because the judgment of this court penalizes this defendant for failure to run a special train on the time and schedule of train No. 9 and 209, notwithstanding this defendant cannot run train No. 9 and 209 when No. 9 of which it is a part is not delivered to it at Red River on time; that the said order of the Commission does not contemplate or require that a special train shall be run out of Denison when No. 9 is more than thirty minutes late,
63 and such special train, if run, would not, comply with said order nor would it be No. 9 or 209, for No. 9 and 209 is a through train made up almost entirely, if not exclusively, of the equipment and traffic of the said No. 9 delivered to this defendant at Red River by the Missouri, Kansas & Texas Railway Company as aforesaid.

(11) Because if the order of the commission directs or requires the running of a special train by this defendant when No. 9 is delivered to it more than thirty minutes late at the Texas-Oklahoma State line as aforesaid, then the said order is void and of no force and effect because the railroad commission only has authority to require this defendant to run additional trains (if at all) when the trains in operation by it are insufficient for the needs of local traffic, and the evidence in this case shows that the train service of the defendant, outside of 9 and 209, is and was ample and sufficient for the needs of the traveling public, and the commission had no authority or right to require this defendant to run any additional train or trains, even could its said order be construed as requiring this defendant to do so, which defendant expressly denies.

(12) Because the evidence shows that train 9 and 209 are limited trains making fast time and few stops, and that any special train run on their time and schedule would not benefit the local public in the territory through which said trains would operate, and the commission is wholly without authority and power, there being no necessity therefor, to require this defendant to run a limited fast train service making few stops between Denison and Austin and San Antonio, in addition to the service afforded by said regular 9 and 209, yet the court by its judgment has held that the order of the commission in substance so requires.

(13) Because the court erred in assessing a penalty on account of both 9 and 209, because they are one and the same train, and but different parts or sections thereof, and if any penalty is prop-
64 erly assessable in its assessment 9 and 209 should be treated as one and the same train, and not as different trains.

(14) Because the court erred in holding that the penalties were cumulative, because under the law and the evidence in this case they are not, and if said order is valid and this defendant violated the same, its violation was continuous and in law but one violation, and, inasmuch as the statute does not make the penalty in this case cumulative, but two penalties at the very most could be assessable against this defendant, even if train 9 and 209 is treated as two separate and distinct trains.

(15) Because the court erred in holding that the violation complained of by plaintiff in section 5 of paragraph 12 of its original petition was established by the evidence, because under the evidence it is not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(16) Because the court erred in holding that the violation complained of by plaintiff in Section 17 of paragraph 12 of its original petition was established by the evidence, because under the evidence it is not shown that the said train 9, did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(17) Because the court erred in holding that the violation complained of by plaintiff in Section 27 of paragraph 12 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(18) Because the court erred in holding that the violation complained of by plaintiff in Section 31 of paragraph 12 of its original petition was established by the evidence, because under the
65 evidence it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(19) Because the court erred in holding that the violation complained of by plaintiff in Section 32 of paragraph 12 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the railroad commission herein *u*sed on.

(2-) Because the court erred in holding that the violation complained of by plaintiff in Section 34 of paragraph 12 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the railroad commission herein sued on.

(21) Because the court erred in holding that the violation complained of by the plaintiff in Section 35 of paragraph 12 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(22) Because the court erred in holding that the violation complained of by the plaintiff in Section 41 of paragraph 12 of its original petition was established by the evidence, because, under the evidence it was not shown that said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(23) Because the court erred in holding that the violation complained of by the plaintiff in Section 43 of paragraph 12 of its original petition was established by the evidence, because, under the

evidence, it was not shown that the said train 9, did not leave Denison on the day in question within the time required by
66 the order of the Railroad Commission herein sued on.

(24) Because the court erred in holding that the violation complained of by the plaintiff in Section 44 of paragraph 12 of its original petition was established by the evidence, because, under the evidence, it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(25) Because the court erred in holding that the violation complained of by the plaintiff in Section 47 of paragraph 12 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(26) Because the court erred in holding that the violation complained of by the plaintiff in Section 48 of paragraph 12 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(27) Because the court erred in holding that the violation complained of by the plaintiff in Section 49 of paragraph 12 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 9 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(28) Because the court erred in holding that the violation complained of by the plaintiff in Section 31 of paragraph 12 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 9 did not leave Hillsboro on the day in question within the time required by the order of the Railroad Commission herein sued on.

67 (29) Because the court erred in holding that the violation complained of by the plaintiff in Section 2 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(30) Because the court erred in holding that the violation complained of by the plaintiff in Section 3 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(31) Because the court erred in holding that the violation complained of by the plaintiff in section 7 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(32) Because the court erred in holding that the violation complained of by the plaintiff in Section 11 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(33) Because the court erred in holding that the violation complained of by the plaintiff in Section 12 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

68 (34) Because the court erred in holding that the violation complained of by the plaintiff in Section 13 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(35) Because the court erred in holding that the violation complained of by the plaintiff in section 14 of paragraph 13 of its original petition was established by the evidence because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(36) Because the court erred in holding that the violation complained of by the plaintiff in Section 16 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(37) Because the court erred in holding that the violation complained of by the plaintiff in Section 17 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(38) Because the court erred in holding that the violation complained of by the plaintiff in Section 22 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the train 209 did not leave Denison on the day in question within the time required by the order of the railroad commission herein sued on.

(39) Because the court erred in holding that the violation complained of by the plaintiff in Section 24 of paragraph 13 of its original petition was established by the evidence, because under

69 the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission.

(40) Because the court erred in holding that the violation complained of by the plaintiff in Section 25 of paragraph 13 of its orig-

inal petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission.

(41) Because the court erred in holding that the violation complained of by the plaintiff in Section 28 of paragraph 13 of its original petition was established by the evidence, because, under the evidence, it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission.

(42) Because the court erred in holding that the violation complained of by the plaintiff in Section 29 of paragraph 13 of its original petition was established by the evidence, because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission.

(43) Because the court erred in holding that the violation complained of by the plaintiff in section 30 of paragraph 13 of its original petition was established by the evidence because under the evidence it was not shown that the said train 209 did not leave Denison on the day in question within the time required by the order of the Railroad Commission herein sued on.

(44) Because the through train service offered by train- 9 and 209 having been inaugurated in Sept., 1909, & the order of the Commission upon which this suit is based having been made in 1907, in no event can said order be construed as a judgment or decree correcting an abuse in the operation of train- 9 & 209, & to so
70 construe it would clearly condemn defendant without a hearing in contravention of the due process clause of Article one, Section 19 of the constitution of Texas, & the due process & equal protection clauses of Section 1 of the 14th Amendment to the Constitution of the United States.

45. Because Article 4494 of the Revised Statutes of Texas on which the order sued on is based, is not sufficient authority therefor, for the judgment of the Court herein, in that said Statute refers to intrastate & local trains & not interstate & through trains.

46. Because the order of the Railroad Commission sued on is not sufficient basis for the judgment rendered for the reason that said order, when properly construed, refers to & is intended to control & govern intrastate and local trains & is not intended to apply to interstate and through trains.

47. Because the said Statute and the said order of the Railroad Commission are both illegal, null and void as and *it* applied to defendant'- train- 9 & 209 and the instrumentalities and facilities used in the operation thereof.

48. Because the penalties assessed by the court in this case are unreasonable and excessive.

That because of foregoing reasons and each & every one thereof, the defendant respectfully prays that the judgment heretofore ren-

dered & entered in this cause be set aside & held for naught & that this defendant be granted a new trial of this case & all the issue- therein.

Respectfully submitted,

ALEX. S. COKE,
FISET & McCLENDON,
A. H. McKNIGHT,
Attorneys for said Defendant.

(Endorsed:) No. 28,684. State of Texas v. The Missouri, Kansas & Texas Ry. Co. of Texas. Defendant's Motion for a New Trial. Filed June 29, 1912. D. J. Pickle, Clerk, by S. A. Philquist, Deputy.

71 *Order on Motion.*

June 29th, 1912.

28684.

THE STATE OF TEXAS
vs.
M., K. & T. RY. CO. OF TEXAS.

This day, June 29th, 1912, came on to be heard defendant's motion for a new trial, and the Court after considering the same is of opinion that the same should be overruled;

It is therefore ordered, adjudged and decreed that said motion be and the same is hereby in all things overruled.

To which action of the Court defendant then and there in open court excepted and in open court gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Defendant is hereby allowed 60 days from this date within which to file a statement of facts and bills of exception.

Defendant now here in open court excepts to the conclusions of fact and law filed herein, and to each one of such conclusions.

72 *Assignment of Errors.*

Filed Oct. 4th, 1912.

In the District Court of Travis County, 53rd Judicial District of Texas.

No. 28684.

THE STATE OF TEXAS
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

Now comes the defendant, the Missouri, Kansas & Texas Railway Company of Texas, and respectfully assigns the following as errors

committed by the court in the trial of this cause, and in the rendition of judgment therein, to-wit:

(1) The court erred in overruling defendant's demurrer to plaintiff's original petition.

(2) The court erred in overruling defendant's demurrer to plaintiff's original petition for the reason that Article 4494 of the Revised Statutes of Texas, on which Passenger Circular No. 18 herein sued on is based, is not intended to and does not apply to interstate trains operated over two or more lines, but is simply intended to require railroad companies operating intrastate trains on their own lines and under their exclusive control, to have a published schedule therefor and to operate the same in accordance therewith; and since the said circular of the Railroad Commission cannot go beyond the statute, it must be construed as not applying to through interstate trains operated over two or more lines, or if construed as applying to them it is void.

(3) The court erred in overruling defendant's demurrer to plaintiff's original petition, for the reason that said Passenger Circular No. 18 of the Railroad Commission, upon which this suit is based, is in substance but a restatement of the duties imposed by Article
73 4494 of the Revised Statutes of Texas upon railroad companies, and adds nothing whatever thereto; that under the statute the duty of the Railroad Commission is limited to correcting abuses, and the only way it can correct an abuse with reference to the operation of trains under Article No. 4494 is to have a hearing upon the subject, and upon the facts heard base its judgment, order or decree requiring the railroad company to do or not to do some particular thing; for the violation of such an order a penalty might be recovered, but no penalty can be recovered for the violation of a general order which simply restates the statutory duty, and is not based upon any particular state of facts; that plaintiff's petition in this case shows that the order made the basis of this suit was general and was not a judgment, order or decree based upon facts with reference to the operation of the train or trains involved, and no penalty whatever can be recover- for a failure to comply with its provisions.

(4) In this case the evidence showed that by agreement the Missouri, Kansas & Texas Railway Company, a Kansas corporation and this defendant a Texas corporation, established, equipped, advertised and had in operation in September, October, and November, 1910, a through interstate route for the transportation of passengers, baggage, mail and express over their respective lines between the cities of St. Louis and Kansas City, in the State of Missouri, on the North and the City of San Antonio, Texas, on the South, and intermediate interstate points, the line of railway of the Missouri, Kansas & Texas Railway Company extending from St. Louis and Kansas City in the State of Missouri, through the state of Kansas and Oklahoma to Red River, or the Texas-Oklahoma State line, and the line of railway of this defendant extending from said latter point into the State of Texas and, among other points, to San Antonio in said State; and that this defendant's train Nos. 9 and 209 and train Nos. 10 and 210 were facilities for and used exclusively in the operation of

such through interstate route, and as such were governed and
74 controlled by the following provision of Section 1 of the Federal Act to regulate commerce as amended June 18th, 1910, to-wit: "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, or storage, and the handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and establish through routes and just and reasonable rates applicable thereto; to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto." That because of this provision and the provisions of Section 15 of the Act which give the Interstate Commerce Commission authority to establish through routes and to make rules and regulations for the operation thereof, the said trains hereinbefore mentioned and the operation thereof, the same being through interstate trains primarily established for the benefit and convenience of interstate traffic, and almost exclusively devoted to such traffic, as shown by the evidence, this defendant having provided ample local trains to care for its intrastate traffic, were under the jurisdiction of the Interstate Commerce Commission and subject to the control and regulation of the Acts of the Federal Congress relative to interstate commerce, and not subject to regulation by the Railroad Commission of the State of Texas, and the said order of the Railroad Commission of Texas upon which this suit is based, known as Passenger Circular No. 18, is therefore an unwarrantable interference with interstate commerce and imposes a burden thereon contrary
75 to the provisions of the Constitution of the United States delegating to the Federal Congress power to regulate and control interstate and foreign commerce. Because of the foregoing matters set out in this paragraph the court erred in rendering judgment against this defendant.

(5) In this case the evidence shows that Train Nos. 9 and 209, parts of No. 9 running South into Denison from the States of Missouri, Kansas and Oklahoma, (and their counterparts Nos. 10 and 210 running North from and out of the State of Texas into the States of Oklahoma, Kansas and Missouri), were established, equipped, advertised and operated in September, October and November, 1910, jointly by this defendant and the Missouri, Kansas & Texas Railway Company primarily for the benefit and convenience and for the transportation of interstate traffic, to-wit: passengers, baggage, mail and express, between St. Louis and Kansas City, Missouri, on the North, and San Antonio, Texas, on the South, and intermediate interstate points; that the equipment of such Train Nos. 9 and 209, consisting of baggage, mail and express cars,

chair cars and coaches, and standard Pullman sleepers, was run through from San Antonio, Texas, and other Texas points, to St. Louis and Kansas City in the State of Missouri, and thereupon run from such Northern termini to the terminus in Texas and back to the Northern termini again, and so on continuously, and that at least seventy per cent of the traffic on said Train Nos. 9 and 209 was interstate; that the said Train Nos. 9 and 209 was a through interstate train and but a part and parcel of a through, continuous and interstate train designated as No. 9, operated from St. Louis and Kansas City, Missouri, through the States of Missouri, Kansas and Oklahoma into Denison, Texas, and points south thereof by the said Missouri, Kansas & Texas Railway Company and this defendant, the former operating said train on its own tracks and under its own exclusive control to the Texas-Oklahoma State line, commonly known as Red River, and *their* delivering said train to this
76 defendant, who owns and operated a line of railroad running South into Texas from the Texas-Oklahoma state line, as aforesaid, and this defendant operated the said train so delivered to it at the said state line into Denison and on to the South the said Train No. 9 at Denison being divided into two sections or parts, one designated for convenience of operation No. 209, running South to Hillsboro, Texas, via Ft. Worth, and the other section continuing under the same designation of No. 9 running via Dallas to the said town of Hillsboro, at which latter point said Train No. 209 was again consolidated with said train No. 9, and the latter thereupon proceeded South to its final destination at San Antonio, Texas, as aforesaid; that defendant's local and intrastate service outside of and independent of Nos. 9 and 209 has at all times been sufficient and ample for the needs of the public, and there has never been any necessity for an increase therein. Because of these facts the court erred in holding that the defendant was subject to the penalties for which judgment was rendered against it, or any of them, for the reason that the order of the Railroad Commission of Texas, known as Passenger Circular No. 18, upon which said penalties and judgment are based, by reason of the facts aforesaid, was and is an interference with and a regulation of interstate commerce, and a burden upon such commerce, all of which is inhibited by the Constitution of the United States which delegates to the Federal Congress the sole power to regulate interstate and foreign commerce.

(6) In this case the evidence shows that Train Nos. 9 and 209 was a part of a through interstate train, established, equipped, advertised and operated during the period in question by this defendant and the Missouri, Kansas & Texas Railway jointly, primarily for the purpose of doing an interstate business between Texas and Missouri and intermediate interstate points, and while not exclusively, in large part devoted thereto, and the evidence shows that all the violations made the basis of the judgment herein, except
77 one, grew out of delays in leaving Denison, Texas, which delays were caused or occasioned by the failure of the Missouri, Kansas & Texas Railway Company, a Kansas corporation with which which this defendant connects at the Oklahoma-Texas state

line, as aforesaid, and over which this defendant had no control or authority whatever, to deliver to this defendant the said through interstate train No. 9 from the North and the equipment jointly provided, as aforesaid, by this defendant and said Kansas corporation for the operation thereof at Red River, or said Texas-Oklahoma state line, on schedule time, so that this defendant might pull the same into Denison over its tracks and arrive in Denison on time, to-wit: 6:10 A. M. of each day; that the court's judgment penalizes this defendant because of the failure of its said connecting carrier to deliver to it on time the said through interstate train and not because of any negligence or default or failure of duty on the part of this defendant, and if the order of the Railroad Commission herein sued on or the statute upon which the same is based is authority for such judgment, then both the said order and the said statute are void, in that they seek to control, regulate and burden interstate commerce, and because they are arbitrary, unreasonable and unjust as applied to the facts of this case, and deprive this defendant of its property without due process of law, and deny to it the equal protection of the law contrary to the 14th Amendment to the Constitution of the United States. Because of the foregoing matters set out in this paragraph the court erred in rendering the judgment against this defendant.

(7) The court erred in rendering judgment against this defendant because the evidence shows that said Trains Nos. 9 and 209 was a part of a through interstate train jointly operated by this defendant and the Missouri, Kansas & Texas Railway Company between St. Louis and Kansas City, Missouri, and San Antonio, Texas, and intermediate points, jointly established and equipped by them,
78 primarily for the purpose of doing an interstate business, and devoted almost exclusively thereto, and because said Train Nos. 9 and 209 is a part of and a continuation of Train No. 9 from the North, originating in Missouri, as aforesaid, and destined to San Antonio, Texas, and due to arrive in Denison, Texas at 6:10 a. m. daily from the North, and because said Missouri, Kansas & Texas Railway Company agreed and was under obligation to deliver said train to this defendant at Red River, or the Texas-Oklahoma state line so that it might pull the same into Denison and arrive there on schedule time, to-wit, 6:10 A. M. of each day, and because the evidence shows that all the violations made the basis of the judgment herein, except one, grew out of delays in leaving Denison, which delays were caused or occasioned by the failure of the Missouri, Kansas & Texas Railway Company, over which this defendant had no control or authority whatever, to deliver to this defendant the said through interstate Train No. 9, and the equipment jointly provided as aforesaid, by this defendant and said Kansas corporation for the operation thereof, at Red River, or said Texas-Oklahoma state line, on schedule time, so that this defendant might pull the same into Denison over its tracks and arrive at said latter place on time, and because it was impossible for this defendant to operate the said Train No. 9 South of Red River and Nos. 9 and 209 out of Denison to the South until the same and the equip-

ment thereof, provided jointly as aforesaid, was delivered to it by its connecting carrier at Red River, or the Texas-Oklahoma line. Therefore, the order of the Railroad Commission herein sued on, known as Passenger Circular No. 18, if considered as applicable to such Train Nos. 9 and 209, is null and void and incapable of performance by this defendant, and the enforcement of same, under the facts and circumstances hereinbefore set out in this paragraph, is arbitrary, unreasonable and unjust, and would deprive this defendant of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

(8) The court erred in rendering judgment against this
79 defendant because the evidence in this case shows that this defendant by agreement with the Missouri, Kansas & Texas Railway Company is obligated to operate said train No. 9 from the North delivered to it at the Texas-Oklahoma State line as aforesaid, through the State of Texas, to its Southern terminus at San Antonio, Texas; that if the order of the Railroad Commission herein sued on has been correctly construed by this Honorable Court, it requires this defendant to run and operate, when the said Train No. 9 from the North is delivered to it more than thirty minutes late at Red River, a special or additional train or section from Denison to its Southern terminus at San Antonio on the time and schedule of Train Nos. 9 and 209, and to leave said No. 9 from the North and the traffic thereon at Denison, thereby in substance requiring this defendant to violate its contract and agreement with the Missouri, Kansas & Texas Railway Company with reference to the operation of said through train and to subject itself to loss and damage by reason thereof and said interstate traffic to delay, annoyance and inconvenience; that the said order of the Railroad Commission so construed is arbitrary, unjust and unreasonable, and impairs and practically destroys the contract and agreement existing between this defendant and the Missouri, Kansas & Texas Railway Company for the operation of said through train, contrary to the inhibition of the Constitution of the United States which denies to any State or its governmental agencies the right to impair the obligation of a contract and interferes with and burdens interstate commerce contrary to the Constitution of the United States conferring on Congress the power to control and regulate same.

(9) The court erred in rendering the judgment against this defendant because if the order of the Railroad Commission sued on properly construed requires this defendant to run special a train when No. 9 from the North is delivered to it at Red River too late
80 for it to comply with Passenger Circular No. 18, as the court holds said Circular is a regulation of, and a burden upon interstate commerce, because the evidence shows that many interstate passengers and large quantities of mail, baggage and express, to-wit: about ten car-loads thereof all told, are handled on No. 9 from the North daily, and tendered this defendant and delivered to it by the Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma state line, and received by this defendant and transported by it over its line to Denison and other points in the

State of Texas/ that it would be illegal, impracticable and practically impossible to hold this train and this traffic, to-wit: passengers, baggage, mail and express at Denison until the schedule time of the departure of some subsequent train several hours later, and Train Nos. 9 and 209 made up of and carrying said equipment received from No. 9 from the North, and the said passengers, baggage, mail and express thereon, would have to be run out of Denison as soon as practicable after the arrival of No. 9 from the North thereat and through to their destination at San Antonio and other points in Texas, notwithstanding the said special train or section had theretofore been run out of Denison in accordance with the order herein sued on, and the contention of the State; that the cost of the equipment necessary for the operation of said special train or section would have been hundreds or thousands of dollars, and the daily cost of the operation thereof would have been many hundreds of dollars all of which outlay and expense would have been unnecessary and would have been a total loss to this defendant, there being no traffic demanding the operation of such special train or section, and a direct burden imposed upon this defendant because of its inability to get said through interstate train from its connection at the Texas-Oklahoma state line on time, and its consequent inability and failure to run its interstate train Nos. 9 and 209 on schedule time; that this regulation and burden could not lawfully be
81 imposed by said statute, Article 4494, of the Revised Statutes of Texas, or by the Railroad Commission acting thereunder on interstate traffic, and was inhibited by the Constitution of the United States giving to Congress the right to regulate interstate commerce, and the order of the Railroad Commission, if properly construed by this Honorable Court to so operate, is arbitrary, unreasonable, unjust and void as a deprivation of this defendant of its property without due process of law.

(10) The court erred in rendering judgment against this defendant because thereby it penalized this defendant for failure to run a special train or section on the time and schedule of Nos. 9 and 209, notwithstanding this defendant cannot run train Nos. 9 and 209 out of Denison on schedule time, when No. 9 from the North of which it is a part, is not delivered to it at Red River on time; that the said order of the Railroad Commission does not contemplate or require that a special train or section shall be run out of Denison when No. 9 from the North is more than thirty minutes late, and such special train or section, if run, would not comply with said Passenger Circular No. 18, nor would it be Train Nos. 9 and 209, for said Train Nos. 9 and 209 is part of a through interstate train made up almost entirely, if not exclusively, of the equipment and traffic, to-wit: passengers, baggage, mail and express of the said No. 9 from the North delivered to this defendant at Red River by the Missouri, Kansas & Texas Railway Company as aforesaid.

(11) The court erred in rendering judgment against this defendant because if the order of the Railroad Commission herein sued on, known as Passenger Circular No. 18, requires the running of a special or additional train or section by this defendant, when No. 9

from the North is delivered to it at the Texas-Oklahoma State line by the Missouri, Kansas & Texas Railway Company too late for this defendant to comply with Passenger Circular No. 18 in leaving Denison, then the said Circular is void and of no force and
82 effect, because the Railroad Commission only has authority to require this defendant to run additional trains, if at all, when the trains in operation by it are insufficient for the needs of local and intrastate traffic, and the evidence in this case shows without contradiction that the train service of defendant outside of Train Nos. 9 and 209, was ample and sufficient during the period in question for the needs of the local and intrastate traveling public, and the commission therefore had no authority or right to require this defendant to run any special or additional train or section, even could its said order be construed as requiring this defendant to do so, which defendant expressly denies.

(12) The court erred in rendering judgment against this defendant, because the evidence shows that Train Nos. 9 and 209 is a limited train making fast time and few stops, and that any special or additional train or section run on its time and schedule would not benefit the local public and the territory through which said train would operate, and the Commission was wholly without authority and power, there being no necessity therefor, to require this defendant to run a limited fast train, making few stops between Denison and Austin and San Antonio, in addition to the said regular service afforded by said Train Nos. 9 and 209.

(13) The court erred in construing the order of the Commission, known as Passenger Circular No. 18, as requiring this defendant to run a special or additional train or section out of Denison to the South on the schedule of Train Nos. 9 and 209, when No. 9 from the North was delivered to this defendant too late to enable it to comply with the requirements of said circular in leaving Denison because such is not the correct construction of said Circular.

(14) The court erred in holding that Passenger Circular No. 18 was valid, when construed as requiring this defendant to run a special or additional train or section out of Denison to the
83 South on the schedule of Nos. 9 and 209, when No. 9 from the North was delivered to it too late to enable it to comply with the requirements of said Circular in leaving Denison for the South, because under the law the Commission had no authority under the facts of this case to require defendant to operate any special or additional train or section as its then local and intrastate trains were ample to care for the local and intrastate traveling public.

(15) The court erred in rendering the judgment against this defendant and thereby holding Passenger Circular No. 18 applicable to its Train Nos. 9 and 209, because said Circular was adopted and promulgated long prior to the inauguration of said Train Nos. 9 and 209, and could not have been intended and was not intended to apply thereto.

(16) The court erred in rendering judgment against this defendant, and in not holding Passenger Circular No. 18 as of no effect as

to this case, because the evidence shows that the through train service afforded by Train Nos. 9 and 209 was inaugurated in September, 1909, and said Passenger Circular No. 18 was adopted in 1907, and not for the purpose of correcting an abuse in the operation of Train Nos. 9 and 209 under the grant of power in Article No. 4494 of the Revised Statutes of Texas, and to construe said Circular applicable to Train Nos. 9 and 209 would clearly condemn this defendant without a hearing in contravention of the due process clause of Article 1, Section 19 of the Constitution of Texas, and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

(17) If the court was correct in holding that Passenger Circular No. 18 was applicable to this defendant's train Nos. 9 and 209, then the court erred in not holding said Circular void, because as so construed the same was and is not authorized by Article 4494 of the Revised Statutes of Texas, and was and is without and beyond the authority of the Railroad Commission.

84 (18) The court erred in rendering the judgment against this defendant, and in thereby holding that Article 4494 of the Revised Statutes of Texas, on which Passenger Circular No. 18 is based, and upon which it must depend for validity, was sufficient authority therefor, and for the judgment of the court herein, because said Statute refers to intrastate and local trains controlled by the carrier, and not interstate and through trains operated by it jointly with another, the latter being the character of said Train Nos. 9 and 209.

(19) The court erred in rendering judgment against this defendant, and in thereby holding that Passenger Circular No. 18, made the basis of this suit, was sufficient authority for the judgment rendered, because said Circular is intended to apply to intrastate and local trains controlled by the carrier, and not interstate and through trains operated by it jointly with another, the latter being the character of said Train Nos. 9 and 209.

(20) If the court was correct in holding that Passenger Circular No. 18, when properly construed, applied to defendant's train Nos. 9 and 209, and that as so construed the same was authorized by Article 4494 of the Revised Statutes of Texas, then the court erred in not holding said order and statute void, because said Train Nos. 9 and 209 and the instrumentalities and facilities used in the operation thereof was engaged in through-route interstate commerce, and by reason thereof subject to the regulation and control prescribed by the Acts of the Congress of the United States, and not subject to such regulation by the State of Texas through its Legislature and Railway Commission as prescribed and provided by said Article 4494 of the Revised Statutes of Texas and Passenger Circular No. 18.

(21) The court erred in rendering judgment against this defendant because Article 4494 of the Revised Statutes of Texas and

85 Passenger Circular No. 18, made the foundation of this suit, are both null and void as and when applied to defendant's Train Nos. 9 and 209 and the instrumentalities and facilities used in the operation thereof, the same, on account of its relation to and con-

nection with interstate commerce, being subject to the control and regulation prescribed by the Acts of the Congress of the United States relative to interstate commerce, and, under the evidence, exempt from the control and operation of Article 4494 of the Revised Statutes of Texas and the said Passenger Circular No. 18.

(22) The court erred in its nineteenth conclusion of fact which is as follows:

"That defendant's — Nos. 9 and 209 were inaugurated and put in service for the purpose of connecting at Denison, Texas, with Train No. 9 of the M., K. & T. Railway Company from Kansas City and St. Louis, and that these trains of defendant carried both interstate and intrastate passengers, but the evidence fails to disclose the proportional part of interstate and intrastate passengers carried by said trains during said period of time in controversy,"

because the evidence shows distinctly that defendant's train Nos. 9 and 209 was inaugurated and put in service jointly with the Missouri, Kansas & Texas Railway Company for the purpose of establishing and operating a through interstate route for the transportation of passengers, baggage, mail and express between St. Louis and Kansas City, Missouri on the North and San Antonio, Texas, on the South, and intermediate and interstate points, and that at least seventy per cent of the passengers carried on defendant's Train Nos. 9 and 209 were interstate passengers.

(23) The court erred in its twentieth conclusion of fact, which is as follows:

"That during the period of time in controversy, the defendant could at reasonable expense have operated its said trains Nos.
86 9 and 209 South from Denison in two sections so as to comply with its published and advertised schedule for said train's arrival at defendant's several stations South of Denison and still have its interstate passengers arrive at Denison over the M., K. & T. Railway Company on defendant's Train No. 9."

Because the evidence shows without contradiction that the defendant could not at reasonable expense have operated its said train Nos. 9 and 209 South from Denison in two sections so as to comply with its published and advertised schedule for said train's arrival at its several stations South of Denison, the evidence showing conclusively that to operate special or additional trains out of Denison on the time of Train Nos. 9 and 209, when No. 9 from the North was delivered to this defendant too late for it to comply with the terms of Passenger Circular No. 18 in leaving Denison for the South, or operate said Train Nos. 9 and 209 in such event in two sections as found by the court, which is the same thing, would have necessitated the incurring of unreasonable expense, and there being no traffic demanding the operation of such special or additional trains or sections, wholly unnecessary expense, which expense would have been a direct burden upon interstate commerce, and with all a compliance with Passenger Circular No. 18 would still not have been accomplished.

(24) The court erred in its first conclusion of law which is as follows:

"The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid."

because said rule is not authorized by Article 4494 of the Revised Statutes of Texas, upon which it must depend for validity.

(25) The court erred in its first conclusion of law which is as follows:

87 "The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid."

because the said Circular was made and passed long prior to the inauguration of defendant's Train Nos. 9 and 209, and was not intended to and does not apply thereto.

(26) The court erred in its first conclusion of law which is as follows:

"The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid."

because said order was made and passed long prior to the inauguration of defendant's train Nos. 9 and 209, and if construed as applying thereto is illegal and void.

(27) The court erred in its first conclusion of law which is as follows:

"The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid."

because said defendant's Train Nos. 9 and 209 is a through interstate train to which said order has no application.

(29) The court erred in its first conclusion of law which is as follows:

"The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid."

because defendant's Train Nos. 9 and 209 is a through interstate train to which the statute on which said Passenger Circular No. 18 is based, to-wit: Article 4494 of the Revised Statutes of Texas, has no application, and said Circular is therefore unauthorized and void.

(29) The court erred in its first conclusion of law which is as follows:

"The order of the Railroad Commission of Texas known as Passenger Circular No. 18, containing said Rule 2 is valid."

because said defendant's train Nos. 9 and 209 is a through interstate train, and cannot, under the evidence, be brought under
88 the terms of said Circular or the Statute upon which it is based, to-wit, Article 4494 of the Revised Statutes of Texas, and as applied to said train said Statute and said Circular are void.

(30) The court erred in its second conclusion of law which is as follows:

"Said order of the Railroad Commission is not a regulation *or*

interstate commerce, nor is it an interference with or burden upon such commerce, but rather tends to facilitate both intrastate and interstate commerce, and promotes the convenience of the traveling public,"

because under the facts of this case and as applied by the court the said order of the Railroad Commission operates as and is a regulation of interstate commerce and operates as and is an interference therewith and a burden thereon, and it does not tend to facilitate interstate commerce or promote the convenience of the traveling public.

(31) The court erred in its third conclusion of law which is as follows:

"Whatever effect said order may have on interstate commerce is only incidental, and then only on account of a violation thereof by defendant"

because under the uncontroverted facts in this case the interference with and regulation of interstate commerce and the burden imposed upon interstate commerce by said order is palpable and direct, and not in any wise incidental.

(32) The court erred in its fourth conclusion of law, which is as follows:

"The other passenger trains provided by defendant outside of Trains Nos. 9 and 209 were not, during the period of time in controversy, adequate and sufficient to accommodate local and interstate (?) passenger traffic on defendant's line of railroad"

89 because the evidence shows beyond controversy that defendant's trains, outside of Nos. 9 and 209, were during the period of time in controversy, entirely adequate and sufficient to accommodate all of its local and intrastate passenger traffic.

(33) The court erred in its fifth conclusion of law which is as follows:

"The evidence fails to show that during said period of time defendant had provided adequate facilities to accommodate the traveling public by providing sufficient through passenger trains, and so arranging the schedule of the same for that purpose"

because the evidence shows beyond controversy that during said period of time the defendant had and provided adequate facilities to accommodate the local and intrastate passenger traffic upon its line of railroad, and had arranged its schedules conveniently for that purpose.

(34) The court erred in its sixth conclusion of law which is as follows:

"Said trains Nos. 9 and 209 of defendant were not engaged solely in interstate commerce, but both of said trains ran wholly within the State of Texas and their crews and a large part of their equipment were picked up at Denison and ran wholly within this State, and a large part of the passengers carried on said trains were intrastate passengers,"

because the evidence shows that Train- Nos. 9 and 209 did not run wholly within the State of Texas, but were parts of a through interstate train running from the State of Missouri through the States of Kansas and Oklahoma to San Antonio in the State of Texas, and all of the equipment starting at the Northern termini was carried through to destination, and a large part thereof was not picked up at Denison, nor were a large part of the passengers carried on said train intrastate passengers, but not more than thirty per cent thereof were such.

90 (35) The court erred in its seventh conclusion of law wherein it finds that on thirteen certain dates therein set out defendant wilfully disobeyed and violated said order of said Railroad Commission of Texas by holding its Train No. 9 at Denison more than thirty minutes after it was due to depart therefrom by its regular published and advertised schedule, for the purpose of making connection with the M. K. & T. train No. 9 from the North, and when said last named train was, before defendant's train was scheduled, and due to depart from Denison, reliably reported to defendant's agent at Denison to be more than thirty minutes late, because the evidence fails to show that defendant wilfully disobeyed or violated said order, but shows the contrary, and because it affirmatively shows that on the thirteen occasions in question this defendant did not hold said Train No. 9 at Denison more than thirty minutes after it was due to depart therefrom by its regular published and advertised schedule, but that on the contrary it pulled said train from Red River to and out of Denison promptly and with all reasonable dispatch, upon receiving the same from its connection from the North, the Missouri, Kansas & Texas Railway Company, at Red River, and the failure to leave Denison sooner on said thirteen occasions was due to the fact that on each occasion the said Missouri, Kansas & Texas Railway Company was late in delivering said Train No. 9 from the North and the equipment thereof and passengers, baggage, mail and express thereon, to this defendant at Red River, or the Texas-Oklahoma State line, and this defendant could not pull said train from Red River to and out of Denison and to the South until it was delivered to it by its said connection, and had defendant's connection not been late, as aforesaid, defendant would not have been late, and would have pulled said Train No. 9 out of Denison to the South as per its published schedule.

91 (36) The court erred in its ninth conclusion of law wherein it finds that on fourteen certain dates set out in said finding defendant wilfully violated and disobeyed said order of said Railroad Commission of Texas by holding its Train No. 209 at Denison more than thirty minutes after it was due to depart therefrom according to its regular published and advertised schedule for the purpose of making connection with said M. K. & T. Train No. 9 from the North, and when said last named train was, before defendant's train No. 209 was scheduled and due to depart from Denison, reliably reported to defendant's agent at Denison to be more than thirty minutes late, because the evidence shows that defendant did not wilfully violate or disobey said order at any time, and that defendant

did not, on the occasions in question, or any of them, hold said Train No. 209 more than thirty minutes after it was due to depart, but that said Train No. 209 was *was* a part of and largely made up of the equipment of said Train No. 9 from the North, which, on the fourteen occasions in question, was delivered to defendant late at Red River by its connection, the Missouri, Kansas & Texas Railway Company; that on said occasions said train, as soon as it was received by this defendant at Red River, was pulled into Denison with all reasonable dispatch, and such portion thereof as was advertised to go by Ft. Worth to Hillsboro was immediately made up as Train No. 209, and speedily pulled out of Denison; that said Train No. 209 could not be pulled out of Denison until No. 9 from the North, of which it was a part, was delivered to this defendant at Red River, and by it pulled into Denison, and had defendant's said connection at Red River not been late, as aforesaid, defendant would not have been late in leaving Denison, and would have pulled said Train No. 209 out of Denison to the South as per defendant's published schedule.

(37) The court erred in its tenth finding of law which is as follows:

"That none of the delays hereinbefore named as violations
92 of the order of the Railroad Commission of Texas were on account of unavoidable accident enroute."

because all of the violations found by the court in this case, except the one mentioned in finding of law No. 8, were occasioned by delays over which this defendant had no control, to-wit: delays of and to the Missouri, Kansas & Texas Railway Company North of Red River, by reason of which said latter company delivered said Train No. 9 from the North to this defendant at Red River too late for it to comply with Passenger Circular No. 18 in leaving Denison for the South with its Train Nos. 9 and 209, and said delays as to this defendant were on account of unavoidable accident en route, and should be so treated and construed.

(38) The court erred in treating Train Nos. 9 and 209 as separate trains, because they are but different parts or sections of one and the same train, and if any penalties had been properly assessible, in their assessment 9 and 209 should have been treated as one and the same train, and not as different trains.

(39) The court erred in holding that the penalties in this case were cumulative and in assessing twenty-eight separate penalties against defendant, because the law does not authorize such accumulation of penalties, and at most, it authorizes, under the facts of this case, the assessment of but two penalties, and this only upon the assumption that Nos. 9 and 209 were separate trains.

(40) The court erred in its eleventh finding of law which is as follows:

"For each of the fourteen violations of said order by Train No. 9 as aforesaid, and for each of the fourteen violations by Train No. 209, as aforesaid, making an aggregate of twenty-eight violations, I
93 have assessed a penalty of Five Hundred Dollars ($500.00), aggregating Fourteen Thousand Dollars ($14,000.00), and have entered judgment accordingly,"

because under the facts of this case there were, at most, but two violations shown, and at most only two penalties could lawfully have been assessed, and this only upon the assumption that Nos. 9 and 209 were separate trains.

(41) The court erred in holding that defendant had violated Passenger Circular No. 18 twenty-eight times, and in assessing against it twenty-eight separate penalties, because if said Circular was violated by this defendant at all, its violation under the evidence was continuous, and in law not more than two violations, and this only upon the assumption that Train Nos. 9 and 209 were separate trains, and therefore, under no circumstances could twenty-eight penalties be lawfully imposed upon defendant.

(42) The court erred in finding that Trains Nos. 1 and 3, mentioned in his Finding of Fact No. 12, were purely local trains and ran on slow schedule, because said finding is contrary to and not supported by the facts.

(43) The court erred in finding that Trains Nos. 201 and 203, mentioned in his Finding of Fact No. 14, were each purely local trains running on a slow schedule, because said finding is not supported by and is contrary to the facts.

(44) The court erred in finding that all of the trains mentioned in Finding of Fact No. 15, which stopped at all regular stations, are purely local trains running on slow schedules, for said finding is contrary to and not supported by the facts.

(45) The court erred in rendering judgment against this defendant for penalties aggregating Fourteen Thousand Dollars ($14,000.00), for the said penalties are unreasonable and excessive, and for such reasons should not have been imposed.

That because of foregoing errors and each of them, the said defendant respectfully prays that the judgment of the court below be reversed and that judgment in its favor be here rendered,
94 or that this cause be remanded to the trial court for further proceedings in conformity with law.

ALEX S. COKE,
A. H. McKNIGHT,
FISET & McCLENDON,
Attorneys for Defendant, The Missouri, Kansas & Texas Railway Company of Texas.

(Endorsed:) No. 28684. The State of Texas vs. M., K. & T. Ry. Co. of Texas. Assignments of Error. Filed Oct. 4, 1912. D. J. Pickle, Clerk.

Bill of Costs.

In District Court, Travis County, Texas, Austin, October 4th, 1912.

No. 28684.

THE STATE OF TEXAS
vs.
M., K. & T. RY. CO. OF TEXAS.

To Officers of Court, Dr.

Clerk's Costs:		Sheriff's and Miscellaneous Costs:	
Docketing Suit	$.20	Clerk's Cost brought forw'd	$65.75
Issuing Citations and Duplicates	1.25	Stenographer Fee	3.00
Issuing Copy Petition and Certificate	3.50	G. S. Matthews, Sheriff: Venire Fee	.50
Entering Appearances	.30	Out County Process (Paid by State Direct)	1.25
Entering Orders	.75		
Filing Papers	1.50	Total	$70.50
Entering Judgment	1.00		
Approving Bond (Appeal)	1.50		
Transcript	55.00		
Assessing Damages	.50		
Taxing Costs	.25		
Clerk's Cost forw'd	$65.75		

95 *Appeal Bond.*

Filed July 8th, 1912.

In the District Court of Travis County, Texas.

No. 28684.

THE STATE OF TEXAS
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

Whereas, in the above numbered and entitled cause, pending in the District Court of Travis County, 53rd Judicial District of Texas, at a regular term of said Court, to-wit, on the 27th day of June, A. D. 1912, the said plaintiff, the State of Texas, recovered a judgment against the said defendant, the Missouri, Kansas & Texas Railway Company of Texas, in words and figures as follows, to-wit:

"On this 27th day of June, 1912, this cause was regularly called

for trial. The parties, plaintiff and defendant, appeared by their respective attorneys and announced ready for trial. A jury not having been demanded by either party, the issues of fact and law were submitted to the Court. The court after hearing the evidence and argument of counsel took said case under advisement, and on this the 27th day of June, 1912 made his findings and entered his judgment in favor of the plaintiff.

"It is therefore, considered, ordered and adjudged by the Court that the plaintiff, The State of Texas, do have and recover of and from the defendant the Missouri, Kansas & Texas Railway Company of Texas, the sum of Fourteen Thousand Dollars, together with all costs of this suit, for all of which execution may issue, to which judgment the defendant in open Court excepts, and
96 asks for conclusions of law and facts." From which judgment the said defendant, The Missouri, Kansas & Texas Railway Company of Texas has taken an appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin:

Now, therefore, we, The Missouri, Kansas & Texas Railway Company of Texas, as principal, and American Surety Company of New York, a corporation, as surety, acknowledge ourselves bound to pay to the said plaintiff, the State of Texas, the sum of Twenty-nine Thousand Dollars; conditioned that the said defendant, the Missouri, Kansas & Texas Railway Company of Texas, appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

Witness our hands, this sixth day of July, A. D. 1912.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS,

By ALEX S. COKE, *Its General Attorney.*

AMERICAN SURETY COMPANY OF NEW YORK,

By G. M. SEAY, *Resident Vice-President.*

[SEAL.] JED C. ADAMS, *Resident Assistant Secretary.*

I have fixed the probable amount of the costs of this suit in the Court of Civil Appeals, the Supreme Court, and the court below, at the sum of One Hundred Fifty Dollars and approve the foregoing bond, this 8th day of July, A. D. 1912.

D. J. PICKLE,
Clerk of the District Court of
Travis County, Texas.

(Endorsed:) No. 28684. The State of Texas vs. The Missouri, Kansas & Texas Railway Company of Texas. Defendant's Supersedeas Bond for Appeal. Filed July 8th, 1912. D. J. Pickle, Clerk.

97 *Clerk's Certificate.*

THE STATE OF TEXAS,
County of Travis:

I, D. J. Pickle, Clerk of the District Court, within and for the County and State aforesaid, do hereby certify that the within and foregoing *on* 100 pages contains a true and correct Transcript of all proceedings had in this Court in cause No. 28684, The State of Texas vs. Missouri, Kansas & Texas Railway Company of Texas, as the same appear of record and on file in this office, except the original Statement of Facts.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of October, A. D. 1912.

(Signed) D. J. PICKLE,
[SEAL.] *Clerk District Court, Travis County, Texas.*

(Endorsed:) No. 5159. Assignment. Missouri, Kansas & Texas Railway Company, Appellant vs. The State of Texas, Appellee. From the District Court of Travis County, Texas, for the 53rd Judicial District of Texas, at Austin, Texas. Applied for by Alex S. Coke, Attorney for Appellant on the 8th day of July, 1912, and delivered to said above named Attorney on the 4th day of October, 1912. D. J. Pickle, Clerk of the District Court of Travis County. Filed in Court of Civil Appeals, 3rd Supreme Judicial District. Austin, Texas, Oct. 4, 1912. R. H. Connerly, Clerk. Rev. & Ren. 4/9/13. Rehearing Granted & Affirmed 5/13/14. Overruled. 6/10/14.

98 No. 28684.

THE STATE OF TEXAS
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

Statement of Facts.

"Original."

(Endorsed:) Filed August 23rd A. D. 1912. D. J. Pickle, Clerk, by S. O. Philquist, Deputy.

99 In the District Court of Travis County, 53rd Judicial District, April Term, 1912.

No. 28684.

THE STATE OF TEXAS
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

Statement of Facts.

Be it remembered, that upon the trial of the above entitled and numbered cause the following facts were proved and evidence introduced:

The plaintiff introduced and read in evidence an agreement between the parties hereto as to the facts, which reads as follows:

100 In the District Court of Travis County, Fifty-third Judicial District.

No. 28684.

THE STATE OF TEXAS
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

For the purpose of facilitating the trial — case and in order to save costs and to simplify and shorten the record, the plaintiff and the defendant, by their respective attorneys, do hereby agree as follows:

1. That the allegations in Paragraphs 1, 2 and 3 of the original petition filed herein (hereinafter designated petition) are true.

2. That on February 23, 1907, the Railroad Commission of Texas made, entered and adopted an order designated Passenger Circular No. 18, which is correctly copied in Paragraph 5 of the petition, and that said Passenger Circular No. 18 was later amended by the Railroad Commission as alleged in Paragraphs 6 and 7 of the petition.

3. That the allegations of fact contained in Paragraphs 8 and 9 of the petition are true, but defendant does not admit the legality of Passenger Circular No. 18 or of any amendment thereto.

4. That during the period of time named in Paragraph 10 of the petition defendant's Passenger Train No. 9 was by its published and advertised schedule therefor due daily to arrive at and depart from the stations in said paragraph mentioned at the times therein alleged, and that during said time its Passenger Train No. 209 was by its published and advertised schedule therefor due daily
101 to arrive and depart from the stations in Paragraph 11 of the petition mentioned at the times therein alleged.

5. That the railroad of defendant connects with the railroad of Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma

State line, about five miles North of Denison, Grayson County, Texas, which point of connection, for convenience, will hereinafter be called Red River. That by an agreement between defendant and said Missouri, Kansas & Texas Railway Company certain trains, among others the train called by them No. 9, are operated from the North to Denison and are inter-changed between the two at Red River, but there is no change in either crew or equipment at Red River, the trains between Red River and Denison consisting of the same equipment and being operated by the same crews of which they consist and by which they are operated upon the railroad of Missouri, Kansas & Texas Railway Company to Red River; that said Train No. 9, operated over the lines of both companies, which, for convenience, will hereinafter be called No. 9, from the North, originates in two sections, one at St. Louis and the other at Kansas City, and both of said sections are run over the tracks of the Missouri, Kansas & Texas Railway Company to Parsons, Kansas, where they are consolidated into one train, which runs South over its tracks to Red River, from which point to Denison it is operated over the tracks of the defendant. While said train and the crew operating the same are in Oklahoma they are under the jurisdiction and control of the Missouri, Kansas & Texas Railway Company, and while in Texas they are under the jurisdiction and control of the defendant.

102 That Train No. 9 from the North was usually composed of about ten cars, some of which, when the train reached Denison, were placed in defendant's Train No. 9 and carried South via Dallas to Hillsboro, the remainder being placed in defendant's Train No. 209 at Denison and run South via Fort Worth to Hillsboro, at which last named place the cars so operated via Dallas and via Fort Worth were again combined into a single train, which was operated over defendant's line to and through the city of Austin. Defendant's Train No. 209 usually carried about three of the cars contained in No. 9 from the North, and the remainder of the cars in No. 9 from the North were usually placed in defendant's Train No. 9. Other cars were picked up at Denison and made a part of defendant's Trains Nos. 9 and 209 from time to time as necessary. Two of the sleepers contained in No. 9 from the North were usually operated via Fort Worth and the remaining three via Dallas. Train No. 209 usually carried about six cars from Denison to Hillsboro, a distance of 151 miles, and Train No. 9 usually carried about seven cars from Denison to Hillsboro, a distance of 172 miles, one or two of which, however, were generally set out at Dallas. From Hillsboro to Granger, a distance of 95 miles, defendant's Train No. 9 usually consisted of 9 cars, and from Granger to Austin, a distance of

103 47 miles, of 7 cars. The cars set out at Granger were carried to Houston and returned, being picked up at Granger again on North bound trips. The equipment of No. 9 from the North usually consisted of two mail, baggage and express cars, three passenger coaches and five sleepers; of defendant's Train No. 209 of two mail, baggage and express cars, two passenger coaches and two sleepers; of defendant's Train No. 9 between Denison and Hillsboro of two mail, baggage and express cars, two passenger coaches

and three sleepers, and of Train No. 9 from Hillsboro to Granger of two mail, baggage and express cars, three passenger coaches, and four sleepers. From Granger to and through Austin the equipment of No. 9 consisted of two mail, baggage and express cars, two passenger coaches, and three sleepers.

That the crews of No. 9 from the North did not come South of Denison, new crews being secured there for defendant's Trains Nos. 9 and 209, and new engines were secured at Denison for said trains.

All of the facts set out in this subdivision of the agreement were true from Sept. 8 to Nov. 8, 1910.

6. That Train No. 9 from the North was, during the period in controversy, due daily to arrive at Dennison at 6.10 o'clock a. m., according to the published and advertised schedule therefor. That on the following dates the said train arrived at Denison later than its published schedule time, as follows:

September	8th,	34 minutes.
"	9th,	18 minutes.
"	10th,	47 minutes.
"	11th,	18 minutes.
"	13th,	1 hour and 9 minutes.
"	14th,	10 minutes.
"	15th,	10 minutes.

104

"	16th,	27 minutes.
"	17th,	32 minutes.
"	20th,	28 minutes.
"	21st,	40 minutes.
"	23rd,	17 minutes.
"	24th,	45 minutes.
"	26th,	19 minutes.
"	27th,	1 hour.
"	29th,	5 minutes.
"	30th,	30 minutes.
October	1st,	13 minutes.
"	7th,	3 minutes.
"	9th,	35 minutes.
"	10th,	35 minutes.
"	12th,	25 minutes.
"	13th,	45 minutes.
"	15th,	2 hours and 40 minutes.
"	16th,	14 minutes.
"	17th,	15 minutes.
"	19th,	1 hour and 15 minutes.
"	20th,	1 hour and 17 minutes.
"	21st,	27 minutes.
"	22nd,	1 hour and 18 minutes.
"	23rd,	1 hour and 20 minutes.
"	24th,	25 minutes.
"	26th,	23 minutes.
"	27th,	21 minutes.

October	28th,	45 minutes.
"	29th,	28 minutes.
"	30th,	1 hour and 15 minutes.
105		
"	31st,	20 minutes.
November	1st,	1 hour and 35 minutes.
"	2nd,	1 hour.
"	3rd,	44 minutes.
"	4th,	35 minutes.
"	5th,	55 minutes.
"	6th,	2 hours and 10 minutes.
"	7th,	50 minutes.
"	8th,	30 minutes.

That on each of said dates it was reported to defendant's train dispatcher and agent at Denison on or before it was due to arrive thereat by its schedule that said Train No. 9 from the North was late and would arrive late at Denison, as set forth above, except on September 21st, when it was reported that the train would reach Denison 20 minutes late and it in fact arrived 40 minutes late, account a loss of 20 minutes between Red River and Denison, due to the failure of the engine to steam, and on October 30th, when it was reported that the train would arrive one hour and 5 minutes late, but it in fact arrived 1 hour and 15 minutes late, account a loss of 10 minutes between Red River and Denison, due to the fact that the engine pulling the train was new and stiff, and therefore unable to handle the train.

All dates mentioned in this and succeeding paragraphs are for the year 1910.

7. That during the period of time in controversy defendant's Train No. 9 actually arrived at and departed from the several stations mentioned in Paragraph 12 of the petition later than
106 the published and advertised schedule therefor, as is specifically set forth in said Paragraph 12, and that its Train No. 209 actually arrived at and departed from the several stations mentioned in Paragraph 13 of the petition later than the published and advertised schedule therefor, as is specifically set forth in said Paragraph 13.

8. That on the respective dates mentioned in paragraph No. 6 hereof defendant's Train No. 9 was late in departing from Denison the respective number of minutes that No. 9 from the North was late in arriving at Denison, as therein set forth, except in the following instance:

September 14th, when defendant's Train No. 9 left Denison 8 minutes late.

October 1st, when it left 12 minutes late.

October 21st, when it left 25 minutes late, and

October 27th, when it left 20 minutes late;

And that defendant's Train No. 9 was further delayed in leaving Denison on the respective dates below mentioned, as follows:

September 8th, 16 minutes, to transfer mail, baggage and express from Defendant's passenger train No. 3.
September 9th, 2 minutes, to transfer mail, baggage and express.
September 10th, 8 minutes, for breakfast.
September 11th, 7 minutes, to transfer mail and baggage.
September 13th, 6 minutes, for breakfast.
September 15th, 5 minutes, to transfer mail, baggage and express from defendant's passenger train No. 3.
107 September 17th, 3 minutes, to transfer mail and express.
September 20th, 2 minutes, to transfer mail and baggage.
September 21st, 4 minutes to transfer baggage and express.
September 23rd, 3 minutes to transfer mail and baggage.
September 26th, 1 minute, to transfer mail and baggage.
September 27th, 10 minutes, for breakfast.
September 29th, 3 minutes, to transfer mail and baggage.
October 2nd, 10 minutes account blocked by switch engine.
October 7th, 2 minutes, to transfer mail and baggage.
October 9th, 5 minutes, to transfer mail and baggage.
October 13th, 8 minutes, for breakfast.
October 15th, 10 minutes, for breakfast
October 16th, 1 minute, to transfer mail and express.
October 18th, 5 minutes, to transfer mail and baggage.
October 19th, 10 minutes, for breakfast.
October 20th, 13 minutes for breakfast and to transfer mail and baggage.
October 22nd, 12 minutes, for breakfast and to transfer mail and baggage.
October 23rd, 5 minutes, for breakfast.
108 October 24th, 5 minutes, to transfer mail and express.
October 28th, 12 minutes, for breakfast and to transfer mail, baggage and express.
October 29th, 2 minutes, to transfer mail, baggage and express.
October 30th, 10 minutes, for breakfast.
November 1st, 10 minutes, for breakfast.
November 2nd, 10 minutes, for breakfast, and 20 minutes waiting for engine.
November 4th, 10 minutes, to switch train and to transfer mail, baggage and express from defendant's Passenger Train No. 3.
November 5th, 5 minutes, for breakfast, and
November 6th 5 minutes, for breakfast.
All references in this paragraph to transfers of mail, baggage or express are to transfers from No. 9 from the North to defendant's Train No. 9 unless otherwise specified.

9. That the departure of defendant's Train No. 209 from Denison, Texas, was delayed as follows on account of the delay of No. 9 from the North in reaching Denison:

September	8th,	34 minutes.
"	10th,	47 minutes.
"	13th,	1 hour and 9 minutes.
"	17th,	32 minutes.

September 21st, 40 minutes.
" 24th, 45 minutes.
" 27th, 1 hour.
" 30th, 30 minutes.
October 9th, 35 minutes.

109

" 10th, 35 minutes.
" 13th, 47 minutes.
" 15th, 2 hours and 40 minutes.
" 19th, 1 hour and 15 minutes.
" 20th, 1 hour and 17 minutes.
" 21st, 27 minutes.
" 22nd, 1 hour and 18 minutes.
" 23rd, 1 hour and 20 minutes.
" 24th, 25 minutes.
" 27th, 23 minutes.
" 28th, 45 minutes.
" 29th, 28 minutes.
" 30th, 1 hour and 15 minutes.
" 31st, 20 minutes.
November 1st, 1 hour and 35 minutes.
" 2nd, 1 hour.
" 3rd, 44 minutes.
" 4th, 35 minutes.
" 5th, 55 minutes.
" 6th, 2 hours and 10 minutes.
" 7th, 50 minutes.

That said Train No. 209 was further delayed in its departure from Denison upon the dates mentioned for the reasons stated, viz:

September 8th, 6 minutes, to transfer mail and baggage.
September 10th, 8 minutes, for breakfast.
September 13th, 11 minutes, for breakfast and to transfer mail and baggage.
September 17th, 3 minutes, to transfer mail and baggage.
September 21st, 8 minutes, to transfer baggage and express.
September 27th, 10 minutes for breakfast.

110

September 30th, 5 minutes to transfer mail and baggage.
October 9th, 2 minutes to transfer baggage and express.
October 10th, 2 minutes to transfer mail and baggage.
October 13th, 13 minutes, for breakfast.
October 15th, 10 minutes, for breakfast.
October 19th, 10 minutes, for breakfast.
October 20th, 8 minutes, for breakfast.
October 22nd, 12 minutes, for breakfast and transfer of mail and baggage.
October 23rd, 5 minutes, for breakfast.
October 24th, 5 minutes, to transfer baggage and express.
October 27th, 12 minutes, to transfer express.
October 28th, 15 minutes, for breakfast. and transfer of baggage and mail.

October 29th, 2 minutes, to transfer baggage and express.
October 30th, 10 minutes, for breakfast.
October 31st, 15 minutes, to transfer baggage and express.
November 1st, 5 minutes, for breakfast.
November 2nd, 31 minutes, waiting for engine.
November 4th, 5 minutes, to transfer mail and baggage.
November 5th, 10 minutes, for breakfast.
November 6th, 10 minutes, for breakfast.
November 7th, 10 minutes for breakfast.

All references in this paragraph to transfers of mail, baggage or express are to transfers from No. 9 from the North to defendant's Train No. 209 unless otherwise specified.

10. That after leaving Denison defendant's Train No. 9 on the respective dates mentioned encountered the following delays due to the following causes:

September 8th: 5 minutes at Celeste to let off passengers; 10 minutes at Greenville account heavy train; 7 minutes at Hiilsboro to transfer mail, baggage and express; 20 minutes at Waco for
111 dinner; 3 minutes at Granger to load and unload baggage, and 2 minutes at Georgetown to load and unload baggage.

September 9th: 10 minutes at Fisher to meet defendant's Passenger Train No. 6; 2 minutes at Hilisboro to transfer mail, baggage and express; 20 minutes at Waco for dinner; 3 minutes at Holland to meet defendant's Passenger Train No. 10.

September 10th: 5 minutes at Greenville to load and unload baggage; 10 minutes at Rockwall to meet Train No. 6; 7 minutes at Hillsboro to transfer mail, baggage and express; 20 minutes at Waco for dinner.

September 11th: 10 minutes at Garland to meet No. 6; 14 minutes between Dallas and Waxahachie account "slow track" due to the fact that defendant's track was undergoing repairs which necessitated a slowing down of the speed of the train; 10 minutes at Hillsboro account the derailment of extra Engine 454, which was an unavoidable accident; 20 minutes at Waco for dinner; 15 minutes between Waco and Granger account engine 71 not steaming, which was an unavoidable occurrence, and 5 minutes at Granger to clean fire of Engine 71.

September 13th: 17 minutes at Bethard to meet Train No. 6; 10 minutes at Hillsboro for dinner, and 10 minutes at Temple, where defendant's line crosses that of the G. C. & S. F. Ry. Co., account a train of the latter Company blocking the crossing.

112 September 14th: 9 minutes at Fisher to meet Train No. 6; 3 minutes at Dallas to load and unload express; one minute at Hillsboro to transfer mail, baggage and express; 20 minutes at Waco for dinner; 8 minutes at Holland to meet Train No. 10.

September 15th: 5 minutes at Fisher to meet Train No. 6; 10 minutes between Dallas and Waxahachie account slow track incident to repairs; 1 minute at Hillsboro to transfer baggage; 20 minutes at Waco for dinner, and 6 minutes at Holland to meet train No. 10.

September 16th: 10 minutes at the North end of the Dallas yards

to meet Train No. 6; 7 minutes at Hillsboro to transfer baggage and express, and 20 minutes at Waco for dinner.

September 17th: 5 minutes at Bethard to meet Train No. 6; 5 minutes between Dallas and Waxahachie account slow track incident to repairs; 20 minutes at Waco for dinner, and 10 minutes between Granger and Austin account slow track incident to repairs.

September 19th: 20 minutes at Waco for dinner; 10 minutes at Bartlett to meet Train No. 10, and 15 minutes at Georgetown to unload passengers and baggage.

September 20th: 7 minutes at Hillsboro to transfer baggage and express; 20 minutes at Waco for dinner, and 15 minutes at Georgetown to unload baggage.

September 21st: 10 minutes at Bethard to meet Train No. 6; 8 minutes between Dallas and Waxahachie account slow track incident to repairs; 9 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner, and 15 minutes between Granger and
113 Austin account slow track incident to repairs.

September 22nd: 5 minutes at Whitewright to load and unload baggage and express; 5 minutes at Kellogg to let off passengers; 5 minutes at Rockwall for orders; 15 minutes at Fisher to meet Train No. 6; 1 minute at Hillsboro to transfer baggage; 20 minutes at Waco for dinner, and 5 minutes at Georgetown to unload baggage.

September 23rd: 8 minutes at Greenville disconnecting bad order brake rigging on sleeper, which was an unavoidable accident; 10 minutes at Bethard to meet Train No. 6; 8 minutes at Dallas to couple up sleepers; 10 minutes at Ball to meet defendant's Passenger Train No. 202; 10 minutes between Dallas and Waxahachie account slow track incident to repairs; 10 minutes at Hillsboro to transfer baggage and express; 20 minutes at Waco for dinner, and 10 minutes at Austin to unload baggage.

September 24th: 15 minutes at Rowlett to meet Train No. 6; 5 minutes at Greenville for coal and water; 5 minutes at North end Dallas yard account engine No. 417 being on main line; 3 minutes at Hillsboro to transfer baggage and express; 20 minutes at Waco for dinner; 9 minutes at Holland to meet Train No. 10, and 5 minutes at Austin to unload baggage.

September 26th: 22 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner; 5 minutes at Holland to meet Train No. 10; 10 minutes between Granger and Austin account heavy train and slow track incident to repairs, and 5 minutes at Austin to unload the baggage.

114 September 27th: 29 minutes at Hillsboro for dinner, there being a heavy run requiring two sittings, and 25 minutes at Austin to unload baggage and 5 minutes at Austin to unload baggage and 5 minutes additional at Austin to set out 2 coaches.

September 29th: 10 minutes at Fisher to meet Train No. 6; 5 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner; 3 minutes at Holland to meet Train No. 10, and 5 minutes at Georgetown to unload baggage.

September 30th: 10 minutes between Ball and Waxahachie account slow track incident to repairs; 30 minutes at Waxahachie ac-

count broken engine frame, which was an unavoidable accident; 20 minutes at Waco for dinner, and 5 minutes at Austin to unload baggage.

October 1st: 20 minutes at Leonard to meet Train No. 10; 8 minutes at Greenville to take coal and water; 5 minutes at Rockwall for water; 4 hours and 15 minutes between Waxahachie and Hillsboro account burned bridge and detouring over line of T. & B. V. Ry. Co. via Teague, a distance of 128.8 miles, which bridge was burned without negligence on the part of defendant; 45 minutes at Hillsboro to make consolidation of defendant's Train No. 203 with Train No. 9; 10 minutes at Waco to load and unload baggage and express; 5 minutes between Granger and Austin account slow track incident to repairs, and 5 minutes at Austin to unload baggage.

115 October 2nd: 10 minutes at Denison account track blocked by switch engine; 5 minutes at Greenville for coal and water; 5 minutes at the Oak Cliff crossing in the city of Dallas account the interlocking plant being occupied by other trains; 20 minutes at Waco for dinner, and 5 minutes at Holland to meet Train No. 10.

October 7th: 10 minutes between Dallas and Hillsboro on account of reducing speed to cross 2 bridges that were being repaired; 7 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner; 8 minutes at Holland to meet train No. 10, and 3 minutes at Austin to unload baggage.

October 9th: 5 minutes at Bethard to meet Train No. 6; 20 minutes at Hillsboro to make connection with Train No. 209, which was delayed account an unavoidable accident, and 20 minutes at Waco for dinner.

October 10th: 5 minutes at Bethard to meet Train No. 6; 2 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner; 3 minutes at Eddy to let off passengers; 5 minutes at Sparks to meet Train No. 10, and 10 minutes at Austin to unload baggage.

October 12th: 15 minutes at Fisher to meet Train No. 6; 5 minutes between Dallas and Waxahachie account slow track incident to repairs; 10 minutes at Hillsboro to transfer baggage and express; 20 minutes at Waco for dinner; 6 minutes at Little River to meet Train No. 10, and 5 minutes at Austin to unload baggage.

116 October 13th: 5 minutes at Greenville for coal and water; 10 minutes at Bethard to meet Train No. 6; 5 minutes between Dallas and Waxahachie account slow track; 20 minutes at Waco for dinner; 5 minutes at Echo to meet Train No. 10, and 5 minutes at Georgetown to unload baggage.

October 16th: 50 minutes at Brick Yard near Bonham Junction account derailment of tank to Engine 342, which was pulling the train, the same being an unavoidable accident; 5 minutes at Garland to meet train No. 6; 5 minutes at Little River to meet Train No. 10; 20 minutes at Waco for dinner, and 5 minutes at Sparks to meet defendant's Passenger Train No. 4.

October 17th: 5 minutes at Leonard for clearance on order board; 13 minutes at Fisher to meet Train No. 6; 9 minutes between Dallas

and Waxahachie account slow track, and 20 minutes at Waco for dinner.

October 18th: 5 minutes at Bonham Junction account slow track; 25 minutes at Fisher to meet train No. 6, No. 6 on this date having left Dallas at 9.10 a. m. and No. 9 having arrived at Fisher at 9.15 a. m. and there being no station or passing place between said points; 5 minutes at Hillsboro to transfer baggage and express; 20 minutes at Waco for dinner, and 25 minutes at Echo to meet Trains Nos. 4 and 10.

October 19th: 2 minutes at Rockwall to meet Train No. 6; 5 minutes between Dallas and Waxahachie account slow track; 1 hour and 50 minutes at Hillsboro for dinner and to connect with
117 No. 209, No. 209 on this date having been delayed at Fort Worth account an unavoidable accident; 5 minutes at Hewitt to meet Train No. 10, and 15 minutes at Austin for supper.

October 20th: 2 minutes at Garland to meet Train No. 6; 10 minutes between Ball and Lancaster account slow track and bridges incident to repairs; 7 minutes at Forreston to let off passengers; 5 minutes at Honey Springs for water; 25 minutes at Hillsboro for dinner; 5 minutes at Waco to load and unload baggage; 5 minutes at Temple to load and unload baggage, and 15 minutes at Austin for supper.

October 21st: 5 minutes at Greenville water tank to replace a bad order steam hose on engine tank, which was an unavoidable accident; 10 minutes at Honey Springs to meet the second section of Train No. 6; 6 minutes at Hillsboro to connect with train No. 209 and to transfer baggage; 20 minutes at Waco for dinner; 10 minutes at Sparks to meet Train No. 10, and 5 minutes at Granger to transfer baggage from Train No. 203.

October 22nd: 5 minutes at Kingston to let off passengers; 10 minutes at Bethard to meet Train No. 6; 10 minutes to flag through block at the North end of the Dallas yards account signals being out of order, which condition was due to an unavoidable cause; 17 minutes at Hillsboro for dinner and to transfer baggage, and 15 minutes at Temple to meet Train No. 10.

October 23rd: 25 minutes at Fisher to meet Train No. 6, No. 6 having left Dallas on this date at 10.14 a. m. and No. 9 hav-
118 ing arrived at 10.25 a. m. and there being no station or passing place between said points (said stations are 7 miles apart), and 10 minutes at Hillsboro for dinner.

October 24th: 10 minutes at Fisher to meet Train No. 6; 10 minutes at Hillsboro because defendant's Trains Nos. 3 and 203 were occupying the line at the station platform to the exclusion of Train No. 209; 7 minutes at Hillsboro to water sleepers; 20 minutes at Waco for dinner, and 5 minutes at Georgetown to unload baggage.

October 26th: 5 minutes at Bethard to meet Train No. 6; 11 minutes at Hillsboro to transfer baggage and express; 20 minutes at Waco for dinner, and 3 minutes at Holland to meet Train No. 10.

October 27th: 5 minutes at Bonham Junction for water; 15 minutes at Fisher to meet Train No. 6; 15 minutes between Denison and Dallas on account of heavy travel during Dallas Fair; 5 minutes be-

tween Ball and Lancaster, account slow track incident to repairs, and 20 minutes at Waco for dinner.

October 28th: 5 minutes at Brick Yard Tank near Bonham Junction for water; 10 minutes at Garland to meet Train No. 6; 5 minutes at Dallas on account of being blocked in at Depot by second section of Train No. 6; 13 minutes at Hillsboro to transfer baggage and express and to make connection with Train No. 209; 20 minutes at Waco for dinner; 2 minutes at Temple to load and unload baggage, and 10 minutes at Austin on account of heavy run of baggage.

119 October 29th: 5 minutes at Fisher to meet Train No. 6; 10 minutes at Hillsboro on account being blocked by train No. 3 at the station platform to exclusion of Train No. 9; 5 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner; and 5 minutes at Georgetown to unload baggage.

October 30th: 5 minutes at Bells to let off passengers; 5 minutes at Leonard to let off passengers; 10 minutes at Fisher to meet Train No. 6; 10 minutes between Greenville and Dallas account heavy travel during Dallas Fair; 10 minutes at Hillsboro for dinner; 5 minutes at Waco to load and unload baggage; 3 minutes at Temple to load and unload baggage; 10 minutes at Echo to meet Train No. 10, and 5 minutes at Georgetown to load and unload baggage.

October 31st: 5 minutes at Dallas to load and unload express; 12 minutes between Dallas and Waxahachie account Engine 344 pulling the train foaming, which was an unavoidable accident; 3 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner; 6 minutes at Sparks to meet Train No. 10; 5 minutes at Georgetown to unload baggage, and 5 minutes between Granger and Austin account slow track incident to repairs.

November 1st: 5 minutes at Brick Yard Tank for water; 5 minutes at Greenville for water; 5 minutes at Rockwall to meet train No. 6; 12 minutes between Denison and Dallas, and 16 minutes between Dallas and Hillsboro account Engine 342 pulling the train foaming, which was an unavoidable accident; 12 minutes at Hillsboro

120 for dinner, and 15 minutes at Austin for supper.

November 2nd: 20 minutes at Rockwall to meet Train No. 6; 10 minutes between Greenville and Dallas account heavy travel; 38 minutes at Dallas in transferring to H. & T. C. track, which transfer was necessary by reason of a collision between two trains of the T. & B. V. Ry. Co., which uses the track of defendant between Dallas and Waxahachie, at Honey Springs, an intermediate station between said points, requiring a detour of Train No. 9; 2 hours and 46 minutes between Dallas and Waxahachie account detouring over line of H. & T. C. R. R. Co. via Garrett, a distance of 43.1 miles; 23 minutes at Hillsboro for dinner, and 15 minutes between South Yard and Granger, and 5 minutes between Granger and Austin account Engine 86 pulling the train not steaming, which was an unavoidable accident.

November 3rd: 7 minutes at Greenville to flag through block on account of signals being out of order, which condition was due to an unavoidable cause; 5 minutes at Greenville for water; 5 minutes at Garland to meet Train No. 6; 22 minutes at Sargent to meet Train

No. 202; 10 minutes between Dallas and Waxahachie account slow track incident to repairs; 12 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner; 8 minutes at Temple to meet Train No. 10, and 10 minutes at Austin to load and unload baggage.

121 November 4th: 5 minutes at Whitewright for water; 8 minutes at Greenville for coal and water; 12 minutes between Denison and Dallas account heavy train; 5 minutes at Dallas to load and unload express; 5 minutes at Honey Springs for water; 4 minutes at Hillsboro to transfer baggage and express; 20 minutes at Waco for dinner; 3 minutes at Sampson to meet defendant's train No. 4, and 10 minutes at Temple to load and unload baggage and meet Train No. 10.

November 5th: 10 minutes at Garland to meet Train No. 6; 12 minutes at Hillsboro to transfer baggage, and 20 minutes at Waco for dinner.

November 6th: 5 minutes at Royse City to meet Train No. 6; 1 minute at Dallas to load and unload express; 15 minutes at Hillsboro to connect with Train No. 209; 17 minutes at Hillsboro for dinner; 40 minutes at Abbott account derailment of a car in defendant's freight train No. 204, which was an unavoidable accident; 13 minutes at Mount Lynn to meet Trains Nos. 4 to 10, and 15 minutes at Austin for supper.

November 7th: 5 minutes at Greenville to pick up sleeper; 13 minutes at Rockwall to meet Train No. 6; 12 minutes between Denison and Dallas account heavy travel and heavy train; 2 minutes at Hillsboro to transfer baggage; 20 minutes at Waco for dinner; 3 minutes at Granger to load and unload baggage, and 2 minutes at Georgetown to load and unload baggage.

122 November 8th: 5 minutes at Bells to let off passengers; 10 minutes at Rowlett to meet Train No. 6; 20 minutes at Waco for dinner; 10 minutes at Sparks to meet Trains Nos. 4 and 10, and 5 minutes at Georgetown to load and unload baggage.

All references in this paragraph to transfers of mail, baggage or express at Hillsboro are to transfers from defendant's Train No. 209 to its Train No. 9 unless otherwise specified.

Where reference is made in this paragraph to a delay account letting off passengers the station named was a regular stop for Train No. 9.

11. That after leaving Denison defendant's Train No. 209 on the respective dates mentioned encountered the following delays due to the following causes:

October 9th: 20 minutes at Collinsville to replace defective journal brass in combination car No. 63, the defect being due to an unavoidable cause, and 5 minutes at the Fort Worth interlocker, the interlocking plant being occupied by other trains.

October 19th: 1 hour and 50 minutes at North Fort Worth due to the derailment of a freight train of the T. & P. Ry Co. on the T. & P. track, which said track between Whitesboro and Fort Worth is used jointly by the defendant and the T. & P. Ry. Co., said derailment making it necessary for defendant's Train No. 209 to detour

over the tracks of the St. L. S. W. Ry. Co. of Texas and the Ft. W. & D. C. Ry. Co.

October 20th: 5 minutes at Denison round house account the track blocked by switch engines and 30 minutes at Argyle
123 to meet defendant's Passenger Train No. 206 and Passenger Train No. 32 of the T. & P. Ry. Co., Argyle being a station on the joint track between Whitesboro and Fort Worth.

October 21st: 15 minutes at Whitesboro to replace defective journal brass in baggage car No. 563, which was an unavoidable accident, and 5 minutes at Fort Worth account the interlocker occupied by other trains.

October 29th: 19 minutes at Whitesboro to replace defective journal brass in baggage car No. 563, which was an unavoidable accident.

October 30th: 10 minutes in the Denison yard account the track being blocked by switch engines; 5 minutes at Argyle to meet T. & P. Train No. 32; 5 minutes at Keller to meet defendant's Train No. 206, and 10 minutes between Fort Worth and Hillsboro account Engine 68 pulling the train foaming, which was due to an unavoidable cause.

November 3rd: 5 minutes at Whitesboro for water; 5 minutes at Argyle to meet Train No. 206; 10 minutes at Roanoke to meet T. & P. Train No. 32, and 5 minutes between Fort Worth and Hillsboro account Engine No. 68 pulling the train foaming, which was an unavoidable cause.

12. That all of the places named or referred to in paragraphs 7, 8, 9, 10 and 11 hereof are regular stations on defendant's line except Ball, which is a siding for the passage of trains.

13. That by "departing late" and "delay" as used herein is meant time consumed or lost over and above that allowed or shown by the advertised and published schedule.

14. That the times herein mentioned for the loading and unloading of mail, baggage and express, for letting off passengers,
124 for taking coal and water, for eating dinner and supper, for detouring trains, and for meeting and passing trains, were reasonably necessary for the respective purposes.

15. That Granger was the scheduled dinner station for defendant's Train No. 9 during the period in controversy, but that during said period it was unable to have the passengers on said train fed thereat, and this made it necessary for such passengers to take dinner either at Hillsboro or Waco, at neither of which places was the train scheduled to stop for dinner.

16. That Train No. 209 was regularly scheduled to stop at the following stations on defendant's said line of railroad: Whitesboro, Pilot Point, Denton, Fort Worth, Egan, Alvarado and Hillsboro; that Train No. 9 was regularly scheduled to stop at Greenville, Rockwall, Garland, Dallas, Lancaster, Waxahachie, Hillsboro, Waco, Temple, Granger, Georgetown, Austin, San Marcos, New Braunfels and San Antonio; that said Trains Nos. 9 and 209 also stopped at other stations on defendant's line of railroad in order to let off any passengers holding tickets from St. Louis or Kansas City

to such station and also to let off passengers at Stations in cases of emergency, such as sickness or death; that at all stations where defendant's said trains Nos. 9 and 209 are regularly scheduled to stop they take on and let off passengers for the several other stations along its line in Texas where said trains are scheduled to stop.

17. That in addition to said Train No. 209, during the period of time in controversy, the defendant also ran over its line from Denison, Texas, by Fort Worth to Hillsboro three other passenger
125 trains daily known as No. 1, No. 3 and No. 205; that said Train No. 1 was scheduled to leave at 1:55 p. m. and arrive at Hillsboro at 9:00 p. m. and stop at all intermediate stations on defendant's said line; that said Train No. 3 was scheduled to leave Denison at 3:55 a. m. and to arrive at Hillsboro at 10:00 a. m., stopping at all intermediate stations; that said Train No. 205 was scheduled to leave Denison at 5:10 o'clock p. m. and to arrive at Hillsboro at 10:30 p. m., stopping at Pottsboro, Whitesboro, Pilot Point, Denton, Fort Worth, Alvarado, Grandview, Itasca and Hillsboro, and that during said period of time defendant also operated over said line a corresponding number and kind of North-bound trains from Hillsboro to Denison.

18. That during the period of time in controversy defendant, in addition to the foregoing trains, operated its passenger train No. 11 from Denison to Wichita Falls, and its passenger train No. 12 from Wichita Falls to Denison; that said train No. 11 was scheduled to leave Denison at 7:00 a. m. and to arrive at Whitesboro at 7:55 a. m. stopping at all intermediate stations; that said Train No. 12 was scheduled to leave Whitesboro at 6:00 p. m., and arrive at Denison at 7:00 p. m., stopping at all intermediate stations; that the said trains were operated over the same track as defendant's Trains Nos. 209, 1, 3 and 205. That during said time the Texas & Pacific Railway Company operated its Passenger Trains Nos. 31 and 32 between Whitesboro and Fort Worth over the aforesaid joint track, using at Fort Worth and Whitesboro and all intermediate points the depots used by the defendant; that T. & P. Passenger Train No. 31 was scheduled to leave Whitesboro at 2:20 p. m. and arrive at Fort Worth at 5:05 p. m.; that T. & P. Passenger Train No. 32 was scheduled to leave Fort Worth at 9:05 a. m. and to arrive at
126 Whitesboro at 11.40 a. m., and that the tickets of defendant were good for passage on said T. & P. trains.

19. That during the period of time in controversy, in addition to Train No. 9, defendant also operated three other south-bound passenger trains from Denison to Hillsboro by way of Dallas, known as Trains Nos. 5, 201 and 203; that said Train No. 5 was scheduled to leave Denison at 5:05 p. m. and to arrive at Hillsboro at 10:30 p. m., stopping at Bells, Whitewright, Celeste, Greenville, Rockwall, Garland, Dallas, Lancaster, Waxahachie and Hillsboro; that said train No. 201 was scheduled to leave Denison at 2:05 p. m. and to arrive at Hillsboro at 9:00 p. m., stopping at all regular stations; that said Train No. 203 was scheduled to leave Denison at 3:55 a. m. and to arrive at Hillsboro at 10:15 a. m., stopping at all regular stations.

20. That during the period of time in controversy, in addition to Train No. 9, defendant also operated three passenger trains from Hillsboro to Waco, known as Trains Nos. 1, 3 and 5; that said Train No. 1 was scheduled to leave Hillsboro at 9:20 p. m. and to arrive at Waco at 10:35 p. m. stopping at all regular stations; that said Train No. 3 was regularly scheduled to leave Hillsboro at 10:35 a. m., and to arrive at Waco at 11:50 a. m., stopping at all regular stations; that said train No. 5 was scheduled to leave Hillsboro at 10:50 p. m., and to arrive at Waco at 11:50 p. m., making no intermediate stops; that said trains Nos. 1, 3 and 5 are the same as Nos. 1, 3 and 5, mentioned in the last two preceding paragraphs after a consolidation with Trains Nos. 201, 203, and 205 at Hills-
127 boro; that said Train No. 3 also continues South from Waco to Granger, leaving Waco at 11:50 a. m. and arriving at Granger at 2:30 p. m., stopping at all stations, and from Granger runs on South over another line of defendant's railroad to Houston; that said Train No. 5 also runs on South from Waco by Smithville to Galveston, leaving Waco at 11:55 p. m., stopping at Temple at 1:02 a. m. and Granger at 1:55 a. m. and continuing from Granger to Galveston over another line of defendant's railroad.

21. That during said period of time in controversy defendant also operated another passenger train known as No. 7 from Waco by Granger and Smithville to Houston, leaving Waco at 6.00 o'clock a. m., arriving at Granger at 8.20 a. m., Smithville at 10.45 a. m., and arriving at Houston at 3.30 p. m., stopping at all regular stations.

22. That during the period of time in controversy in addition to Train No. 9 defendant also operated two other south-bound passenger trains from Granger through Austin to San Antonio known as Trains Nos. 231 and 235; that said train No. 231 was scheduled to leave Granger at 8.30 a. m. making connection with No. 7 from Waco and arriving at Austin at 10.25 a. m. and departing therefrom at 11.55 a. m. and arriving at San Antonio at 3.25 p. m., stopping at all regular stations. That said Train No. 235 was scheduled to leave Granger at 2.35 a. m., carrying connection from No. 5 from the North, arriving at Austin at 4.25 a. m. and at San Antonio at 7.30 a. m., stopping at Weir, Georgetown, Pflugerville, Sprinkle, Austin, San Marcos, New Braunfels, and San Antonio; that during said period of time defendant also operated a corresponding number and kind of North-bound trains over said lines to Hillsboro;
128 that said Train No. 235 carried through to San Antonio two sleepers which it received at Granger from Train No. 5 from the North.

23. That defendant's North-bound train No. 10 originating at San Antonio during the time in controversy was scheduled to leave San Antonio at 10.00 a. m., Austin at 1.00 p. m., Granger at 2.50 p. m., Hillsboro at 6.05 p. m., and Dallas at 8.15 p. m., arriving at Denison at 11.10 p. m.; and its passenger Train No. 236 originating at San Antonio was during said time scheduled to leave San Antonio at 9.00 p. m., Austin at 11.59 p. m., and to arrive at Granger at 1.50 a. m., where it consolidated with defendant's said Train No. 6 from Galveston; that during said time defendant's Passenger Train No. 6

originating at Galveston was scheduled to leave Granger at 2.35 a. m., Hillsboro at 6.15 a. m., Dallas at 8.40 a. m., and to arrive at Denison at 11.50 a. m., that during said period of time defendant's Passenger Train No. 206 was scheduled to leave Hillsboro at 6.20 a. m., and Fort Worth at 8.35 a. m., and to arrive at Denison at 11.45 a. m., where it consolidated with Train No. 6; and that during said time defendant's passenger train No. 210 was scheduled to leave Hillsboro at 6.05 a. m. and Fort Worth at 7.55 p. m., and to arrive at Denison at 11.05 p. m., where it consolidated with its train No. 10. Of the trains mentioned in this paragraph only trains Nos. 10 and 235 passed through Austin.

24. That all of defendant's passenger trains carried passengers, mail, baggage and express.

25. That either party may, on the trial of this case, introduce any material testimony in addition to but not in conflict with the foregoing.

Signed this 17 day of June, A. D. 1912.

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129 It was admitted that on October 19, 1910, train No. 209 experienced an additional delay of one hour and fifty minutes between Denison and Fort Worth stations for the causes set forth in the agreed statement of facts, and that on said date train No. 209 actually arrived at Fort Worth station at 12.40 p. m. and that on said date defendant's said train No. 9 actually arrived at Hillsboro at 1.10 p. m.; that said train No. 9 was held at Hillsboro one hour and fifty minutes, awaiting the arrival of said train No. 209 at Hillsboro; that defendant's agent at Hillsboro was informed at the time of the arrival of said train No. 9 at Hillsboro that said train No. 209 would not arrive at Hillsboro until said period of one hour and fifty minutes after the arrival of said train No. 9 at Hillsboro.

Plaintiff Rests.

Defendant's Evidence.

W. G. CRUSH, for the Defendant, testified as follows:

My name is W. G. Crush. I am General Passenger Ticket Agent of the Missouri, Kansas & Texas Railway Company of Texas. I live in Dallas. I have been General Passenger and ticket Agent of said company nearly nineteen years, and held that position in October and November, 1910.

I am familiar with the defendant's trains Nos. 9 and 209. With

regard to the character of those trains and the circumstances
130 under which their operation was begun, during that period the Gould lines the T. & P., the I. & G. N., and Iron Mountain, and the Santa Fe had night trains out of North Texas to St. Louis, Kansas City and a territory where there was a large volume of Summer tourist business that we lost largely on account of lack of a night departure or evening departure out of North Texas, as people claimed that by leaving Dallas and Fort Worth and that territory in the evening they had the advantage of a night's ride to get away from the hot territory that we had to go through by leaving that territory in the morning. When the discussion of putting on this train came up with a view of taking care of this North-bound travel, Waco began to complain that they had but one through train, the "Katy Flyer," which left Waco about 4 o'clock in the morning and seriously handicapped them; what they wanted was a day train, as against this very early hour in the morning. Then inquiries were made from other stations. Austin immediately made application, and so did San Antonio—stated that unless we had a train for this Northern business that was at least as good as our competitors had we would lose traffic. Investigations were then made all along the line as to what amount of this through business or interstate traffic to St. Louis, Kansas City and other points could be controlled, and it was found that by putting on a high class interstate train we could control sufficient traffic at least at that time to pay for the operation of the train. As it usually takes railroad companies a long time to incur the big expense that was involved in putting on this train, buying equipment and all other expenses incident to it, which in round numbers was about a million dollars, we did not get the train for the early summer tourist business of 1909, but finally got it in September, 1909. The train was primarily, originally and solely put on for the purpose of taking care of our through or interstate business to and through St. Louis and Kansas City. In Texas the train originated at San Antonio and was operated to St. Louis and Kansas City. The
companies interested in its operation were The Missouri,
131 Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company. There was a very distinct understanding between those companies regarding putting on the train; several conferences were held between the two companies to bring about the train service. Neither could operate that service without the consent of the other. So far as the Texas company is concerned, there would have been no occasion to have put on or operated the train unless it could have had its Northern terminus at St. Louis and Kansas City. We operated one train each way daily; those trains were popularly called the "Katy Limited." The "Limited" left San Antonio in the morning at 10 o'clock, reaching Waco about 4 p. m., Dallas about 7.55 or 8 p. m. and Denison about 11 p. m. As to what other interstate trains we had at that time, we had trains Nos. 5 and 6, known as the "Katy Flyer." As to how the time the "Flyers" left San Antonio and the other stations corresponded with the time of the "Limited," it was just the opposite, about twelve hours' difference; the "Katy Flyer" left San Antonio at 9 o'clock at

night. We had a South-bound "Flyer" as well as a North-bound, and a South-Bound and North-bound "Limited."

As to what percentage of the traffic of the "Limited" was interstate and what per cent intrastate, we have no statistics that show the intrastate and interstate business separately by trains, though we have it as a whole. But in this particular instance I made as comprehensive an investigation as I could, using my own judgment, from personal observation at the time, and from interviews with conductors, train auditors and our auditor, and with the sleeping-car people, and from their records and the records that we have,
132 and the percentage was estimated that from 70 to 80 per cent was interstate and the balance intrastate. My own opinion is that about 75 per cent of the traffic on the "Katy Limited" was interstate business; that would include South-bound trains Nos. 9 and 209 as well as the North-bound. It must be remembered that the through traffic or interstate traffic to and from Texas is just reversed; in summer it is North-bound and in winter it is South-bound, so it is a busy train practically during the entire year in both directions with interstate traffic. The Fort Worth section of the "Limited" carried two sleepers, and the Dallas section carried three. We would not have had on any sleepers if it had been strictly a day train or a train for Texas traffic. We have five immensely heavy specially built sleepers on the "Limited" through the entire State of Texas for the *sold* purpose of being in position to accommodate the interstate business from whatever points it may originate to its various destinations, whether it be Kansas City or St. Louis. The only reservations of sleeping-car space that agents in Texas have for the "Limited" are to either St. Louis or Kansas City and beyond. We have a sleeping-car "Manual," showing the reservations for each station. This is the "Manual." This is known as an assignment of space on sleeping-cars for the agents' guidance; in other words, this is gotten up so the agent at San Antonio, for instance, does not sell the same berth the agent at Dallas may have in the same car, or at Austin or Waco. I have here Austin, North-bound train No. 10, sleeper from San Antonio to Chicago—I forgot to mention that we also had that Chicago sleeper. Austin has section 1 to Chicago; Houston has section 2 to Chicago; Waco has sections 5 and 6 to St. Louis, and Fort Worth has 5 and 6 to Chicago, with transfer at St. Louis. There is no space whatever assigned to any agent in Texas that he could use to a point in Texas; it was intended only for the use of our through pas-
133 sengers going to either St. Louis, Kansas City or Chicago. Here is another line North-bound, San Antonio to St. Louis; San Antonio has 3, 4 and 5 to St. Louis; Austin has 1 to St. Louis; Houston has 2 to St. Louis; Fort Worth has 6, 7 8, 9 and 10 to St. Louis; that is train No. 10. Now, here is the Dallas-St. Louis sleeper. We would certainly have never put on a sleeper out of Dallas to accommodate State business as far as Denison, but there was through business to St. Louis that demanded a through sleeper to take care of that interstate traffic. There was not one assigned for Texas use; they were exclusively for interstate business.

I stated that my estimate of the per centage of interstate pas-

sengers and intrastate passengers applied to Nos. 9 and 209 as well as North-bound trains. They interchanged at the State line with both trains in each direction. What I have said in reference to sleeping-car space on No. 10, North-bound, applies to Nos. 9 and 209 South-bound trains—that is, it was intended for the benefit of Texas passengers from the northern termini from points outside the State to points in Texas.

With regard to what it would cost per train mile to operate extra trains out of Denison upon occasions when No. 9 from the North was more than thirty minutes late in reaching Denison, when we put on a train, adding additional train mileage to our schedules, we always figure and estimate the cost of additional train mileage at one dollar per mile—that is, where a train is to be regularly operated between two points in each direction, we must know in advance it is going to earn a dollar per mile each way in order to pay the expense. Now, when a special train is put on, as would have been the case as mentioned, the cost would have been greater, because first of all in running the train in one direction the occasion for running it would not have existed—that is, the train would have to go back, but
134 go back dead-head, without earning any revenue, and the cost of operation is the same in each direction, so it would in reality have cost us two dollars a mile to substitute a daily train No. 9 from the Red River South. We would not have much revenue from such a train, because it would earn so little revenue, not being a Texas train and not being so scheduled and not making the stops to earn revenue from Texas, because all of the earnings of the train would have been on the through train.

I believe the distance from Denison to San Antonio, including the distance from Denison to Hillsboro by Fort Worth, is 549 miles. We would have had an expense of two dollars per mile for that distance, as a minimum. It would really have been practically impossible to run those special trains. In the first place, those trains 9 & 209 are advertised to have certain equipment. It would be practically impossible to have assembled and maintained that equipment at Red River or Denison to take those trains out when delayed; the motive power could not have been there. It is not possible to operate a special train, a train of that character and nature, on a few minutes' notice. Aside from that, the cost that would have been necessary to maintain all of that equipment at Red River would have been an expense that would have been absolutely prohibitory; it could not have been done, even if we had wanted to. In the first place, the Pullman Company would not have furnished sleepers, particularly of that type. It would have been an investment of at least four complete trains to always be in position, and that much motive power out of Denison, to say nothing of the additional motive power from various division points and terminals on through to destination; it would have been a great many thousands of dollars. It cost a million dollars to equip the "Limited" for operation. It would
135 not cost quite half that much to equip the special trains; it would cost about four hundred thousand dollars; it would have cost many hundred thousands of dollars to furnish that extra

train service, and that in no way would have relieved us from running through these daily through trains when they arrive at Red River. The "Limited" was advertised and published to the world as a through train from Kansas City and St. Louis to San Antonio, and it had to go through regardless of when it arrived at Red River. No. 9 left St. Louis at 10.05 a. m. At that time No. 10 arrived about 6.30 p. m. No. 5, the "Flyer," left St. Louis at 8.32 p. m. and arrived at 7.30 a. m. No. 9's connection left Kansas City at 6 p. m. No. 10's connection arrived at Kansas City at 11.15 a. m. Nos. 5 and 6 had Kansas City connections. No. 5's connection left Kansas City at 2.20 a. m. and arrived about midnight.

During September, October and November, 1910, there was a trolley line operated between Dallas and Sherman, and another operating between Sherman and Denison; they operated cars every hour each way; they began operation at 5 a. m., I understand, and operated until 9 or 10 p. m. The Houston & Texas Central Railroad Company operated two trains each way daily between Denison and Dallas during the period mentioned; those trains left Denison at 5.50 a. m. and 5.20 p. m.; it is just about three hours' run from Denison to Dallas. With regard to other train service or trolley service between Denison and Dallas, we had a train out before the "Limited," about 4 o'clock in the morning, and had one out at noon, and one out in the evening about 5 o'clock, for Dallas; we had Nos. 1 and 3 and 205 by Fort Worth, and Nos. 201, 203 and 5 by
136 Dallas. The accommodations offered by those trains were very adequate to supply every demand of our local passenger traffic. The "Limited" was not at all required to take care of our Texas traffic i. e. intrastate traffic. The "Frisco" Railroad operated between Denison and Fort Worth. The H. & T. C. trains mentioned did not terminate at Dallas; they went on through to Houston. The "Frisco" had a train leaving Denison at 3.25 p. m., arriving at Fort Worth at 7.40 p. m.; then they had a train from Sherman that had a connection with the H. & T. C. 5.50 a. m., train, leaving Sherman at 7 a. m., arriving at Fort Worth at 11.20 a. m., they had two trains a day each way between Fort Worth and Denison.

Cross-examination:

The territory through which our line ran from Denison by Dallas to Hillsboro was during the time mentioned what we consider a thickly settled country down here; that was also the case in reference to the country through which our line ran from Denison by Fort Worth to Hillsboro. Besides Dallas and Fort Worth, our line ran through Greenville and Waxahachie, which I consider fairly good sized towns. Our Fort Worth line runs through Denton, Pilot Point and Whitesboro, but they don't amount to much. There are several towns of from four or five to ten thousand inhabitants on the two lines from Denison to Hillsboro. Our line runs through a thickly populated country from Hillsboro to Austin, passing through several good towns—Waco, Temple and Georgetown. Bartlett and Holland are not of much importance. From Austin to San Antonio our line passes through San Marcos and New Braunfels, which are flourish-

ing towns with a good future. During that time our road had, comparatively speaking with other roads in Texas, a heavy passenger traffic; the traffic held up pretty well. I do not think we enjoyed the best passenger traffic in Texas in 1909. I think the passenger traffic was pretty bad in September, 1910. As compared with the other roads in the State, we probably did fairly well during
137 the period from September 8th to November 8th, 1910. I don't like to admit that we did better than any other road in the state, so far as passenger traffic is concerned, during the period mentioned; we probably had as good passenger traffic as any other road in Texas during that period.

With reference to how many railroads or how many points on our line South of Denison to San Antonio we cross or intersect or have junction points with other railroads, on the line from Denison to Dallas the first crossing is at Bells, where we cross the Texas & Pacific; there is no other road there. At Whitewright we cross the Cotton Belt; at Celeste the Santa Fe; at Greenville the Cotton Belt and the Texas Midland, and there we also had a branch from Mineola *d*nd Shreveport; at Garland we intersect the Santa Fe; at Dallas we cross or intersect or connect with the Texas & Pacific, the Santa Fe, the H. & T. C., the Cotton Belt, the "Frisco," the T. & B. V., the T. & N. O., and I think the Rock Island was in there then; South of Dallas, at Lancaster we cross the H. & T. C., a branch line; at Waxahachie, the H. & T. C. and T. & B. V.; at Hillsboro, the Cotton Belt and T. & B. V. On the line from Denison around by Fort Worth, at Whitesboro we intersect the T. & P.; at Whitesboro we have a branch to Wichita Falls; at Denton we have a line of our own down to Dallas; at Fort Worth we cross or intersect the Santa Fe, the H. & T. C., the Fort Worth & Denver, the T. & P. the Rock Island, the "Frisco," the I. & G. H. and the Fort Worth & Rio Grande. The line of the Santa Fe at Fort Worth is a different branch from their lines at Dallas and Celeste. The "Frisco" is two systems, the Fort Worth & Rio Grande and the St. Louis & San Francisco; they are two different railroad corporations, with different corporate names, but all under one system. Coming on from
138 Fort Worth towards Hillsboro, at Alvarado we cross the Santa Fe's Dallas branch to Cleburne; cross it first at Egan. I forgot one crossing on the Dallas line; that is at Italy, where we cross the I. & G. N.'s line. There is no other crossing until we get to Waco, where we cross or intersect the Texas Central, I. & G. N., H. & T. C., the Cotton Belt, and the S. A. & A. P.; at Temple we intersect the Santa Fe and a little road called the Temple & Northwestern, and at Bartlett there is the Bartlett road, but I don't believe it was being operated; there is nothing else, except at Echo we have our own line to Belton—that really goes into Temple. The next connection is at Granger; from Granger on South we have two lines; one being the Austin division and the other the Houston and Galveston division. Coming on South from Granger, at Georgetown we intersect the I. & G. N.; we do not go to Taylor coming to Austin; Taylor is on the line to Houston; at Palm Valley we cross the I. & G. N., but there is no stop there; at Austin we cross or intersect the

H. & T. C. and the I. & G. N.; at Austin there are two branches of the H. & T. C., one to Houston and one to Llano, and we connect with both. From Austin to San Antonio, we cross or connect with the I. & G. N. at San Marcos and with the I. & G. N. at New Braunfels; at San Marcos we connect with our line between San Marcos and Smithville; Lockhart is on that line.

During the time spoken of there were two trains out of Denison South on our line each day, that stopped at all stations. Those trains did not carry the same character of equipment and were not the same character of trains as the "Limited" and the "Flyer." We had four trains our of Denison South each day. The "Limited" was No. 9 and the "Flyer" was No. 5. The other trains were not as fast as the "Limited" and "Flyer," because they made all
139 the stops; the coaches and chair-cars were of the same type as carried on the "Limited" and "Flyer," but were not new. Those trains were Nos. 1 and 3. The accommodations on trains Nos. 1 and 3 were not anything like as good as on No. 9 because No. 9 carried sleepers. I do not believe Nos. 1 and 3 carried any sleepers south of Fort Worth & Dallas, during the period from September 8th to November 8th, 1910; those are southbound trains. We had a sleeper on Nos. 1 and 2 between Fort Worth and Kansas City. No. 1 was a south-bound train; we had a sleeper on there. We had a sleeper on No. 3 from Kansas City to Dallas. Both of the sleepers South-bound originated at Kansas City. The trains that we operated besides the "Limited" and the "Flyer" carried one sleeper each to Dallas and Fort Worth, but no farther South. The corresponding trains North-bound were Nos. 2 and 4; they each had a sleeper, one from Dallas and one from Fort Worth; they carried no sleepers South of Dallas and Fort Worth; there were no sleepers from San Antonio until you got to Dallas going North, and none from Dallas South to San Antonio, and it was the same with reference to Fort Worth. The Dallas and Fort Worth sleepers on those trains were for Kansas City, outside of the State.

I can not tell you the schedule of passenger trains on the various railroads that we have enumerated as crossed by our line during the time from September 8th to November 8th, 1910, but I can get that information from this Railroad Guide. I can furnish the numbers of passenger trains and when they passed the stations where we intersected them. Coming from Denison to Dallas the first crossing is at Bells, where we cross the T. & P. I can give the trains on the T. & P. and when they arrived during the period
140 stated; I can do that in this particular instance; North-bound trains left Bells at 1 p. m., 4.35 p. m. and 8.15 a. m.; southbound trains left at 10.17 a. m., 1 p. m. and 10.07 p. m. The first important town south of Denison coming towards Sherman is Whitesboro; then come Denton and Fort Worth. I can get up that information in reference to each of the stations where we intersect or cross other railroads. I presume you want to show how important it was for this train to stop to get business over this line, but bear in mind that the Texas & Pacific would not sell a ticket for us where they had their line. Even if we did stop we could not

get business off that line; we would not have gotten anything off those connecting lines. If a man wanted to get on our line at Bells, for Kansas City or St. Louis, we would gladly have stopped for him. Our "Limited" North-bound would stop at any station where it was not scheduled to stop, provided that passenger was destined to St. Louis or Kansas City or Chicago; that is train No. 10, and No. 9 would stop and let off passengers from Kansas City or St. Louis, and Nos. 10 and 6 would stop at any regular station to pick up a passenger to take him to Kansas City, St. Louis, or Chicago, but not to any other point outside the state—just to or through those points. With regard to whether our No. 9 coming South also furnished sleeper transportation for people from points in the state to other points in the State, if anybody wanted to take a long, tiresome, hot trip we would not refuse him transportation on there. We had sleeper transportation on both the "Flyer" and the "Limited." The "Flyer" was a very desirable train for Texas business; it was as much an interstate train as the "Limited," but it came through and arrived in Austin before daylight; it carried passengers from Denison, Dallas, Hillsboro and all those points and furnished sleeping accommodations to Austin and San An-
141 tonio; it cut off a sleeper at Austin, and carried another to San Antonio, to accommodate Texas traffic; it was a train that was of benefit to Texas people. We furnished sleeper accommodations on that train for citizens of the state going from San Antonio and Austin to points in the State North, and did a very big business on those trains.

With reference to my statement that the passenger traffic on trains Nos. 9 and 5 and 205 was composed of passengers 75 per cent of whom came from outside the state, that is an estimate. I have nothing definite in the way of records upon which to base the estimate; to a large degree it is really a guess upon my part—well, not entirely on my part, as I interviewed a great number of others. I am taking other men's statements, and can not give any accurate figures, but I have my knowledge of the business; it is a positive knowledge that I have. I can not now state the facts on which I base the opinion. I could not at this time state how many passengers we took on at Denison for points South in Texas, nor can I state the number we took on at the various stops made in Texas for other points in Texas, excepting that the number was very small. I have compiled a statement of the passenger receipts of all our traffic at the various stations in Texas, but can not furnish the passenger receipts for trains Nos. 9 and 5 and 209, either South-bound trains or North-bound trains, as they are not separated. About all I have is my recollection as to the proportion during that period of time, and I approximate that as something like 75 per cent being interstate traffic; that is in round figures. and is just general information. My estimate is not largely based upon information I got from conductors; their information was corroborative evidence, and simply corroborated my own knowledge. I did not ride on the train or go through the train every day, but did so very frequently. I have no specific recollection as to how often

142 I was on the train from September 8th to November 8th, 1910, but I know that I was on the train during that period. I could not state accurately how many times I was either on the train or went through the train during that period. When on the train I did not ask passengers whether they were from outside the state or whether they were from points in the state to other points in the state; I asked the train auditor or conductor, and that would be positive information, because he would have his ticket collections, and I frequently looked at the tickets. I can not recollect how many tickets I examined nor how many were outside the state and how many were inside the state. I have no independent recollection as to how many of those passengers were from points in the state to points in the state or from points outside the state to points in the state; I could not separate them to save my soul at this time. The company has not those tickets now; they are *d*ustroyed; we do not preserve them that long. We have no record of those tickets. There is a record of the number of passengers carried on a train, without regard to where from or to what points they are going; the conductor makes a report that he handled on his run say 465 passengers, without regard to the point of origin or destination. We have a record of the number of passengers we received from the M., K. & T. Railway Company, as apportioned between the two companies, but that would not show from what trains they were delivered. We have no record that shows the passengers that were delivered on trains Nos. 9 and 6. It is not by days; it is a monthly report; we don't have a daily record, only the actual tickets. I can tell you tomorrow or day after tomorrow the passengers and their origin and destination handled on trains today or yesterday, because those tickets are stamped showing what trains they are
143 handled on. Statistics are then made up to show the number of passengers and the destinations to arrive at the number of passengers handled one mile and the average distance. We have no record at all showing the number of passengers we received at Denison from the M., K. & T. daily. Our records are kept monthly; there is no daily record at all. Our tickets themselves would show how many passengers we receive, but the tickets for the period in question have been destroyed. We have a monthly record of the number of passengers we received from the M., K. & T. and how many we delivered, but we have nothing like a daily statement. Our record shows the number of passengers we delivered to the M., K. & T. monthly; I have not that record here, and it would not signify anything if it were here. That record gives the gross number of passengers, but does not distinguis*g* between trains. We interchanged four passenger trains with the M., K. & T. at Red River, each way. There were four south-bound trains coming into Texas from the North every day; they came over the M., K. & T. tracks until they got to the Red River. Those four trains carried passengers from outside the state into the state. Likewise there were four North-bound trains, which carried passengers from in the state out of the state. All of those trains carried passengers into and out of the state and picked up passengers in the state and set

them down in the state. On each of those four trains each way we make a division as to earnings with the M., K & T. Railway Company. Our records do not show the percentage of the earnings on the four trains each way, by the month. As to how we can settle with the M., K. & T. Railway Company by the month with the proceeds prorated, if an agent sells a hundred tickets a month to St. Louis, regardless of what trains they go on, we pay the M.,
144 K. & T. their proportion of the earnings of a hundred tickets to St. Louis. We have a record of the total amount on the trains North and South. I am not able to credit any particular train with its proportion, not the proportion of September 8th to November 8th, 1910; I can give you the months of September, October and November, 1910. It would take all that period of time to get at it approximately. As to whether or not the "Katy Flyer" was as desirable a passenger train for interstate passengers as the "Limited," in the fall of 1910, the point of origin would have a good deal to do with that. If a man were going to Waco or Temple or Hillsboro, or points in there, the "Limited" would be decidedly more desirable; South-bound, a man going to Austin or San Antonio possibly would prefer the "Flyer," on account of the time it gets out. As to what percentage of the passenger business on the "Flyer" is represented by interstate travel-rs and what percentage by local, Texas travelers, there would be a much greater percentage of local, Texas business on the "Flyer," very much greater than on the "Limited"; I guess it would be 60 or 70 per cent more. I would like to add that we are now operating independent trains between Dallas and Fort Worth and Austin and San Antonio, known as Nos. 7 and 8, that now largely take care of the traffic between North and South Texas. In 1910 we did not have that service. Therefore, all of the Austin-San Antonio-Dallas Fort Worth night traffic, which really means all of the traffic, had to be handled on the "Flyer"; and as to the relative comparison, I guess it would be safe to say that the "Flyer" did 90 per cent more Texas business than the "Limited." I think January 1st 1911, is the date when we put those trains on which together with the "Limited" and "Flyer" & other trains took care of the Texas business. The "Flyer" of necessity at times did practically all of our Texas state business or through business. Our records would not show
145 the total amount of business done by the "Flyer" in October and November, 1910; it would be credited to gross earnings. There are no statements prepared showing the earnings of individual trains. As to how we figure out whether a particular train pays or not, we are getting those earnings, but it does not show where the business is. Take the earnings of trains Nos. 9 and 10, we take the earnings of those trains, regardless of where the ticket may be sold or where it is destined; get the value of every ticket on the train and then you know what the train earns—divide the gross revenue by the number of miles run. The "Katy Flyer" is exempt from the thirty-minute rulings as an interstate train, but it is not anything like the interstate train the "Limited" is. If there is an exemption that should be made on account of

being interstate, it should be the "Limited." The Commission did exempt the "Limited" at one time, since 1909, because it was an interstate train.

With reference to the equipment on the other two trains mentioned, Nos. 1 and 3, it is standard equipment including chair cars. They have the equipment necessary to accommodate the local traffic; it is the same character of equipment, but not as high class or expensive as that on the "Limited." Nos. 1 and 3 go to Kansas City, and did at that time. They have more coaches than the "Limited" and the "Flyer," to properly accommodate the local traffic. Interstate travelers have Pullmans to a large extent.

In forming my estimate of the amount it would take to furnish an extra train to go South from Denison, I figured it two dollars a mile; that is for a round-trip; I mean a dollar each way. It would cost a dollar a mile to run the train whether we get any revenue or not; it would require the same crew—you have to get them back in some way. It would require the same crew to run an engine and
146 seven or eight cars back without any passengers as it would to run them down with a lot of passengers; the law provides for that; you have to run the train as though every seat were taken; it would cost as much going back, and a little bit more, because the crew would kill time on you. It takes as much fuel going back without passengers as going down with passengers. My calculation is assuming that it would cost as much to haul the train one way as the other. That is based upon the equipment on train No. 9 Southbound, or any train, whether it has that equipment or not, because the estimated cost of running a train, whether it be three or four or five or six cars, is a dollar a mile; that is an arbitrary charge, for practical railroad purposes. When you come down to a question of what it really will cost to put on another train, you have no sure way of ascertaining it. If you furnish a train that carries no Pullman cars you have an initial cost that is less. If the local traffic out of Denison wants to go South in the morning at the same time No. 9 is due there, I will not admit that we can take those people by running coaches just like we do most of the Texas business, having a train ready that will cost much less, because we can not single out this one train to fit this particular occasion. You have to take your operating expense as a whole and figure that the cost of operation of railroad trains is one dollar per mile, and when you operate a special train that has to be your cost. There are elements that enter into it possibly in the way of sleeping-cars to increase that cost, but this element is to be considered. I took pullman cars into consideration in figuring the dollar a mile, but did not charge any more for putting them in; I did not charge any less for not getting them in, but did not charge any more—I was fair both ways. I did not say that one train to take care of the Denison situation arising out of the failure to meet the schedule would cost four hundred thousand dollars, for one train could not take care of that; it
147 would take about four trains. I figure upon having Pullman cars and giving the service advertised as we have advertised No. 9. We can not advertise a train to have all this equipment and

not run it. We advertise No. 9 as our regular "Limited" train South-bound; it carries certain equipment that is advertised; that equipment, however, in respect to Pullman is more for interstate travel. Of course, the extra train could not carry interstate travelers who are beyond the state line; therefore, the extra train would be a train to take care of the local business. In my estimate of the cost of extra trains I included Pullman cars. A pullman car costs about twenty-five thousand dollars. I included about five pullmans in the extra trains; that is a hundred and twenty-five thousand dollars. With regard to my knowing that that is not a fair comparison, because pullmans are not required to take care of the Denison situation, we don't need them and we don't want that extra train. I figured on the cost of the train because I was asked the question. We don't want the train at all. It would require about four trains, at a cost of about a hundred thousand dollars each; that would be two North and two South. If you cut off the two North-bound trains you save half the cost. Each of those trains would include three of four pullmans. If you run the trains south of Denison without Pullmans you save another seventy-five or hundred thousand dollars. Now, if we were going to buy two extra trains, one to run through Dallas to San Antonio and one by Fort Worth to Hillsboro, suppose the train were late today and we start a train out on time and run it through to San Antonio, and suppose No. 9 should be late again tomorrow, what are we going to do? No. 9 runs in two sections south of Denison, and they consolidate at Hillsboro and go on down the main line. Neither of those trains is exclusively devoted to interstate travel, but the travel is interstate as well as intrastate. We would get rid of practically all that interstate business if No. 9 were not
148 on time and we were taking care of the local business by the proposed extra trains. I have stated that we have adequate facilities for taking care of the Texas traffic in other trains. This proposed extra train out of Denison would take care of the traffic originating at Denison and such as we would pick up on the way; one coach would take care of it. We would not have to have so big a train, only not to mislead the people or misrepresent. One coach would take care of all the traffic, but we don't need the train at all, because the business is not there for the train. Upon the assumption that we do need it, we could run a very small train out of Denison to Hillsboro and all the way to San Antonio. That kind of train would not cost near as much. Two cars would take care of all the business—an engine, baggage-car, a combination for whites and smoking-car and chair-car would take care of it. I think one coach would take care of the traffic out of Denison as well as that picked up on the way down to San Antonio, on that schedule, not making local stops. As to how much it would cost to take care of that situation with that kind of train, the equipment would cost about twelve thousand dollars a car; it would take four trains, at about thirty-five thousand dollars a train. I believe a hundred and twenty thousand dollars would buy enough equipment, to say nothing of engines. We have not plenty of engines; we are going to get ten next month; we are shorter on engines than a hen is of teeth—mighty near not

any. As to whether we would really need four trains, suppose No. 9 were late today; it leaves Denison at 6.35 a. m. and gets to San Antonio tonight at 9.30; I have two trains now going south, one by Dallas and one by Fort Worth. Now, suppose No. 9 were late tomorrow; I have to have two trains to take care of that. I am figuring upon running one train by Dallas and one by Fort Worth,
149 and yet I am running both of them all the way to San Antonio; of course, we would consolidate them at Hillsboro. As to why we would consolidate them if one coach were sufficient, what do we have five sleepers on the "Limited" for? It is to take care of the business if we have *nay*. The train leaves Denison at 6.35 a. m. and is due in Hillsboro something after 11 a. m. If we bring that train around by Fort Worth and take it back to Denison we can get it back that night, and we would have only one to go on to San Antonio, but we would need both trains; if in Fort Worth we advertise a through train to San Antonio we have to run it. The one to Hillsboro could get back to Denison the same evening and be ready to take No. 9's schedule out the next morning. With reference to changing our advertisements and advertising that whenever No. 9 is not on time an extra train will start out at 6.35 a. m., that extra train is not needed. With regard to advertising a merely local train out of there, it would follow, using your viewpoint, that wherever a train was late over thirty minutes, regardless of the cause, we should start a train out on time to accommodate a possible passenger; we may have a possible passenger out of Denison some morning for that train. There are more than sufficient trains starting at Denison on time for the passenger that wants our Southbound train to Dallas or Fort Worth; he is not going to wait for a train that is late. The fact that the trains have been delivered to us late was through no fault of the Texas Company, but there was an obligation on our part to run those trains through to accommodate that traffic on the trains, which was interstate traffic; however, for the volume of business to be taken care of, there was no need to start a train out of Denison when that train was late. I don't think there has ever been such need of it; the hour of departure is such
150 that there was no need of it. The street car and interurban service has practically put the H. & T. C. out of business; they are running one train into Denison to protect their charter. If we could abandon some of the service between Denison and Dallas we would gladly do it. As to when our next train is due out of Denison South, we have one out at 2.05 p. m.; that means a wait of eight hours if they want to go on the "Katy," but it is worth waiting that long. There are plenty of other railroads and trolley lines. There are no connections to make at Bells. We don't recognize connections at every crossing. If the hour of arrival of our train suits a man's convenience we certainly have no objection to his using the train and getting off there, but we don't attempt to make connection with every railroad we cross. We are going to prepare a time-card in Dallas tomorrow without ever looking up or seeing what time any other railroad leaves any station where we cross; we operate our trains for our own passengers first; the obligation is to the people along our

line; if it suits connections, well and good; but in making schedules to suit a fellow at Gonzales or Seguin we would never have any trains for our own people. I don't think this connection business is of any merit in this case, because schedules are made regardless of what the connections are on the other roads. We have one train out of Denison South in the morning before this interstate train. We have more business on the early local train out of Denison into Dallas than on the "Limited"; that is a local train getting out of Denison at 3 o'clock in the morning, and we have a great deal more business on it than on the "Limited"; there is a very satisfactory reason for that; it is not because that train goes out on time; it is because we don't stop the "Limited"—it is not run for that purpose. The "Limited" stops at Greenville, Garland and Rockwall; that is the enormous sum of three stops it makes. We stop at Rockwall, not from choice,
151 but because we were compelled to; the law made us stop there. We stop at Garland because of a railroad crossing—didn't have an interlocker at that time, and we made a station crossing; we did not need it for business. We avoid as many stops as possible on interstate business.

With reference to falling down on our advertisements and having that trouble as far as our schedule is concerned during the period in question, I don't think we were any worse than our neighbors, and don't think the criticism *way* any worse. There was no need whatever for any extra train; that was my objection to running it; but if we did have to run it it would be a very pleasant thing to have carried out the advertisement and advertise that high class train on the "Limited's" time for such few people as would take it, just to run on schedule—that would be the most pleasant thing of all.

Regarding the records of our company as to the number of passengers we receive from and deliver to the M. K. & T., that is a monthly ticket report. The M. K. & T. has no record of the daily number of passengers they delivered to us or received from us; I made inquiry of them, and they have no such record. We have a copy of their monthly ticket report, a report they make to us of the number of passengers delivered to us or tickets sold over our road every month; that is the same character of record that we keep. The two roads keep substantially the same character of record; we have our own and theirs, too—that is, we have their report of ticket sales, which shows the number of tickets and destination. The record shows the total volume of business done from Denison South during the months spoken of; it is not separated by trains, and I cannot give the business done by No. 9 nor by any other train.

Redirect examination:

Neither the interstate Commerce Commission nor the Railroad Commission of Texas requires us to keep any statistics or data
152 showing the number of passengers carried on each train; we must show only the total number. Our books are kept absolutely in accordance with the requirements of both the Interstate Commerce Commission and the Railroad Commission.

With reference to my estimate of the per cent of interstate pas-

sengers carried on trains Nos. 9 and 10, I would not say that that was a pure guess. I conferred with our conductors, agents and train auditors and got the opinions of those that should know. However, my own estimate, based upon my own knowledge, is that 70 per cent was interstate travel. The information that I got from others made me raise that estimate. As General Passenger Agent, I am familiar with these facts, and my estimate is reliable; I was not simply guessing at it.

I stated that the equipment of trains Nos. 1 and 3 was not as new as that of No. 9; it was the same class of equipment exactly as that used on No. 5; it was comfortable and amply sufficient. No. 9's equipment was only a year old in 1910. Nos. 1, 3, 5 and 201 had the same class of equipment. No. 9 was scheduled to leave Denison at a certain hour, but it could not leave until it got there. What we published for the information of the public was that that was a through train, to leave Denison when it got there, so that the through passenger would know about where he was. The equipment of No. 9 was from both of the companies; each company paid its proportion of the expenses of the train; the train was gotten up for the benefit of the interstate business. It would take the same crew to man the small trains referred to on cross examination; a small train would require as large a crew as a large train; that is a matter that is fixed by law. There would not be much difference in the matter of fuel, and the estimate as to the cost of operating an extra
153 train would not vary a great deal. We make no distinction between the sizes of trains in arriving at the cost of trains; we figure one dollar per mile for all trains; that is an estimate used by operating people after years of experience; they have reached the conclusion that that is the cost, and that is what we must always figure on earning. We just take the entire cost of running and divide it by the number of miles operated; one train might cost a little less and another a little more, and bring that average.

During the period of time in controversy we had a sixteen-hour law, and we were not permitted to work men over sixteen hours. If the sixteen hours had expired while the crew was on the road they would have found the first sidetrack and stayed there until relieved. Those things contribute to the expense of train operation.

The Texas Company is under contract to receive this train No. 9 from the other company at the state line; we have a contract with them agreeing to run the train through whenever delivered. It is manifest that we can not take the train until we get it. If we were to run this special train from Red River or from Denison, when the "Limited" comes in we would still have to run it; the obligation would be to run it through. With regard to holding the "Limited" over to make connection with some other train, that would put us out of business; it would destroy the usefulness of the train for this through competitive interstate business for which the train was put on. We could not hold interstate passengers there until some subsequent train was due to go out. The same condition exists Northbound; the M. K. & T. Railway Company takes the train from us whenever we deliver it; the unavoidable does happen. A railroad

man looks upon delayed trains with the greatest horror;
154 delayed trains are the greatest nightmare that the passenger man has, and I would sacrifice almost anything if we could keep our passenger trains on time. The fact that the Railroad Commission issued a thirty-minute order is not going to keep the train on time. As I told Chairman Mayfield, it would not keep the train on time if they issue such orders every five minutes in the day. We have spent lots of money to keep trains on time, but the unavoidable is going to happen anyhow. The first and greatest factor in handling passenger traffic is to have on-time trains, and we are going to make some schedules tomorrow that are going to be on-time schedules, and going to have on-time trains, as we have been having the last few months. The "Limited" does not stop except as per schedule to let off passengers coming South, except passengers from St. Louis, Kansas City and beyond, and the North-bound trains stop only as per schedule except to take on passengers destined to St. Louis, Kansas City and beyond, accomplishing the purpose of an interstate train. Assuming that the train is thirty minutes late getting into Denison, and at thirty-one minutes we start out of there with a local train to take its place; the "Limited" goes all the way from Denison to Greenville without a stop, and a local train taking the place of the "Limited" would not stop at Bells; therefore, a man going to Bells would not be helped by the extra train, nor would it help a man who wanted to go from Denison to Whitewright—it would only provoke him to find that the train was not going to stop there. The same thing would apply to Trenton and Celeste and on down to Greenville, so it would not help the people going from Denison to any of those little towns, or from any of those little towns to Greenville or from one to another. Coming South we intersect the Texas Mid-
land at Greenville, which in turn intersects the H. & T. C. at
155 Garrett; we also have the Cotton Belt with trains into Fort Worth and Dallas; we also have the M. K. & T. trains to Greenville and McKinney, and Greenville to Shreveport; so if a man wanted to go from Greenville to Fort Worth he had the Cotton Belt, and had some pretty good "Katy" trains there. The next stop of the "Limited' after it passed Greenville coming South was Rockwall; the first station out of Greenville is Caddo Mills, next is Royse City, next is Fate, and then Rockwall; so passengers from Denison and Greenville to intermediate points would not be helped in any way if they wanted to go to Caddo Mills, Royse City or Fate. The next stop is Garland, next is Rowlett, and next is Fisher; passengers going to those places would not be helped. Without going over the various stations, that situation would apply up and down the line all the way to San Antonio—we would be running little bob-tailed through trains. The same situation would apply going North. At Bells we cross the T. & P., which goes to Fort Worth; at Celeste there is connection with the Santa Fe; there is direct connection on the Santa Fe from Celeste to Dallas. South from Dallas, if you wanted to go to Waxahachie you could go over the T. & B. V., with direct train service, and there is direct train service from Fort Worth over the T. & B. V. There is very good train service from

Dallas to Temple over the Santa Fe; I use it sometimes. There is train service from Waco to Temple, and from Waco to Fort Worth over the I. & G. N. There is service from Waco to San Antonio over the San Antonio & Aransas Pass and over the I. & G. N. also. As to whether or not there is any part of the state of Texas that has such good service, not including the "Katy" service, but over other railroads, as this territory has, there is no railroad that has such strong competition as the "Katy". Also, we are the long line between those points, which is another hardship.

156 Regarding the expense of running a train to take the place of the "Limited," which I estimated at four hundred thousand dollars, the question asked me on direct examination was what would be the cost of such a train as the "Limited." With regard to cutting out the North-bound train and reducing the cost, you have to have the trains down here and you have to run them back; if you run a train one way you have to have one in the opposite direction.

Recross-examination:

We start all trains in Texas going North. There is no delayed condition North-bound. There is no use in taking care of trains going North, except to get the trains back. We would have to run two extra trains out of Denison, one by Dallas and one by Fort Worth; if we had one back in Denison on time to go out the following day, and the second day we should run the same train around by Fort Worth, then we would not have one around by Dallas. I figure that we ought to have four trains; it would take three; we could run on three trains, if nothing happens, but it would not be good railroading. To meet such a condition with insufficient equipment is not good railroading. I stated that one engine and one express and baggage car and one coach will take care of the business to San Antonio, with another train to go around and make that turn, one by Dallas and one by Fort Worth. With regard to its not being necessary to consolidate those two trains at Hillsboro, you would not be giving through service; you would not think we were giving service if you were a passenger with your wife and a lot of people compelled to be at Hillsboro in the hot sun or a down-pour of rain. I take

157 the passengers' standpoint that they prefer a through train. Of course, you are bringing about a possibility, and not a probability. We would not undertake to operate a through train by changing cars at Hillsboro. Leaving that out, I will admit that it is possible to run it in the manner stated, thereby reducing the cost one-fourth, but it is not in a practical sense.

With regard to my statement that we are going to inaugurate some schedules tomorrow that will be all right and run on time, we did not start a schedule from Denison on time in September and October, 1910, because we had obstacles that we had to overcome in the meantime, such as getting water, putting on dining cars, building up the track, and putting down new steel and new ties. As to what obstacles existed in September and October, 1910, that do not today exist, that prevented us from starting a train out on time at 6.25 a. m., coming South, feeding passengers at the same place those on the

"Limited" were fed, there was no obstacle that existed at that time except the North end obstacle—the obstacle that the M. K. & T. Company had in making that late delivery—and we did not have the equipment, and we did not feel the need or the necessity of providing ourselves with it. Outside of that, I cannot think of anything that prevented it. The extra train was not regarded as necessary; if there had been any need for it we would have provided it.

I figured 70 per cent as the proportion of interstate travel as against 30 per cent intrastate travel on No. 9 during the period in question. That estimate is based upon facts. I made it my business to ride the trains a great deal to look after and encourage travel on this train; it was a new train, and I was anxious to make it pay. I could not find out the wants or the needs of the train unless I personally rode it. I would start out on the train out of San Antonio, and would find say eight people in the Chicago car going to Chicago. Leaving Austin I would talk with the conductor, and he would say,
158 "Well, I've got ten for Kansas City or St. Louis," and at Waco that would be the case. I would go through the train and check up the passengers as to their destination. We have to keep posted all the time as to where people are going in order to determine how to make sleeping-car reservations; you have to know where the travel is going in order to be able to handle it intelligently. We go through the coaches and find out how many of those people will want sleeping-car accommodations. A certain per cent will ride in the coach at night to save two dollars. On that personal contact I base *by* opinion. Perhaps three or four people would get off at Waco, and fifteen or twenty would get on. The same condition would exist at Dallas and so on all the way. I would talk to the conductors of the sleeping-cars as to the destinations of passengers. It is that personal contact with the business that makes me say that 70 per cent of the travel on the train was interstate. It is in that general way that I formed my estimate. I cannot take any given week or month since we put on the "Limited" and tell the Court how many interstate and how many intrastate passengers were on the train, and it would not be of any value, because one day would not reflect the condition; it takes an entire month. I think my long experience entitles me to a reasonably sure estimate on business of that character. In my original testimony I stated that the statements made by conductors, auditors and others merely corroborated my opinion and showed a greater percentage of interstate travel than I thought was true. In stating that it was 70 per cent I have always felt that I have been extremely conservative and not visionary; I believe that 70 per cent is a very conservative estimate. It is not possible to take any given period of time, daily or monthly, since this train was put on and state how many passengers were interstate and how many were intrastate passengers. The tickets were destroyed. I happen- to be
159 in St. Louis last week and got a wire from McCoke, our General Attorney, with a view of seeing if I could get some information there. They had destroyed the tickets used during the period in question, because they could not get a building large enough to hold them. They keep tickets six months. The auditors' reports

show the number of passengers handled, but do not show whether they were interstate or intrastate. The tickets themselves, of course, would show, because they are stamped, but unfortunately this period is so far back those tickets are destroyed. Of course, it would be a gigantic undertaking to assort the tickets—it would be nearly impossible. Our records show how many passengers were delivered at Denison and how many we handled then to Dallas. If there were two thousand delivered at Denison and we had four thousand into Dallas we would have two thousand from Denison, but that would not show upon what trains they were handled. I don't see that separating it by months would give any information as to business on this train. That process would not restrict it to the "Flyer" and the "Limited," because there are four trains the traffic could go on. We get more business out of Denison South on the early train, at 3 a. m., than on the later train; they want to get into Dallas early.

Redirect examination:

Our records will show the number of passengers we received from the M. K. & T. Railway Company during any particular month in 1910; they show the South-bound passengers separate from the North-bound, and would show the number of passengers handled from Denison to Dallas during the month. Still, that would not show the interstate business. I would have to go through the report of every railroad company in the United States that sold tickets over our lines to see what tickets they sold through Denison by the Muskogee-McAlester gateway, because the M. K. & T. report would not show that.

160 Recross-examination:

If a man buys a ticket from Austin to Waco I count him an intrastate passenger. If a man buys a through ticket from Buffalo, New York, to Austin I can find out only by examining the New York Central's report. I can give you the number sold by the M. K. & T., but it will not reflect the true number of interstate passengers on train No. 9 delivered to the Texas Company at Denison. To give you the number of passengers the M. K. & T. delivered to us, I would have to go through all those reports to get it; it would be a gigantic undertaking, but I am perfectly willing to get it up, because I think it will go a little bit better than my estimate.

Redirect examination:

Any statistics will refer to all trains of the M. K. & T. and not any other particular one. My answer is with reference to the "Limited" alone; I have no reference whatever to the "Flyer." The M. K. & T.'s report shows, for instance, that in September they sold ten tickets from St. Louis to Dallas and ten to Austin and fifteen to Waco, and shows the sale of tickets from every station on their line to every station on our line, but don't show the tickets sold by the Chicago & Alton. If a man bought a ticket from Philadelphia over the M. K. & T. and over the M. K. & T. of Texas to Austin, our record would not show that we accounted to the M. K. & T. for so much. The Pennsylvania Railroad accounts to the M. K. & T. of Texas. The

only accounting between the M. K. & T. and the M. K. & T of Texas is for such tickets as we sell over their lines. When we take up the final ticket we do not account to every road over which the
161 traffic comes; the selling line makes the reports. When we sell a ticket from here to Philadelphia then we account to the M. K. & T. and the Vandalia to Indianapolis and on to Pittsburgh and Philadelphia; the line that gets the money has to do the distributing; the receiving line has as evidence the ticket it takes up; that is its due bill against the issuing line; we make reports to each other, and each line retains its own coupons; each road accounts to the other line for the money it receives.

I have not made any estimate as to the average number of passengers delivered by the M. K. & T. Railway Company to the defendant on No. 9 during the months of September and October, 1910; I understand that Mr. Monday made that estimate.

J. MONDAY, for the defendant, testified as follows:—

I am Superintendent of the North Texas division of the defendant company. I have had thirty-five years' experience in railroad work in various capacities, from Messenger boy to Superintendent.

With regard to the allegation that on September 8, 1910, No. 9 from the North was thirty-four minutes late in reaching Denison, it would be hard for me to say whether that train was in sight of the Denison station thirty minutes after its scheduled time of arrival or not, as I was not there at the time; I would say it was possible to see it. When trains are coming from the Red River South you can see them about five minutes out from Denison. As to the condition of the road-bed between Denison and the Red River, it is very hilly all the way from the Red River up to Denison. The statement that a train can be seen five minutes out from Denison applies on each of the days when No. 9 was more than thirty minutes late in reaching Denison. I mean to say that you could see the smoke from the train; you could not see the train two train-lengths at that
162 particular point, but you can see the smoke. When I see the smoke I would understand that the train was between Red River and Denison. You could not only see the smoke, but hear the train coming. A train has to work very hard coming up the hill into Denison; for about five miles there it is a one per cent grade. It takes about ten or eleven minutes to run from the River to Denison.

With regard to the average number of passengers on No. 9 delivered by the M. K. & T. Railway Company to the M. K. & T. of Texas at Red River during the period in controversy, I have made an estimate based upon information given me by men who handled trains during that period, but not from personal observation, because I was not in position at that time to give it any personal observation. By "men who handled trains" I refer to conductors, brakemen and train auditors. I got the information referred to during the past week. I talked with men in actual service on these particular trains during the time in controversy. I should think that a man who handles trains has a pretty good idea of the num-

ber of passengers on them, especially the train auditors and conductors. When a train reached Red River all the passengers on it were delivered by the M. K. & T. Railway Company to the defendant and brought into Denison, because there is no stop between Red River and Denison.

With reference to train No. 209, which on November 2, 1910, was delayed in leaving Denison thirty-one minutes, waiting for an engine, the records show that the delay was caused on account of there being no water at Denison, and it was necessary to take the engine, which was to move the train from Denison, to a tank about four miles North of Denison—namely, Warner Junction pumping station—to give her water. It was during the water famine, and a good many of the engines had to be taken out there for water, and this was one of them on that occasion, and it was impossible to get the water any quicker. Had to wait out there on the pump.

163 There was an extended drouth there during that year and the following year, and this was a necessary delay; it could not be helped. The company did the best it could to get water, there is no doubt of that; it had to take such water as it could get and wherever it could get it.

I have had occasion to estimate the cost of running passenger trains, the cost per mile. My estimate of the cost of running an average M. K. & T. passenger train would be about 80 cents a mile; but that is not authority, as it varies on different railroads, all the way from 70 cents to a dollar and a half a mile; different conditions govern it.

W. G. Crush, recalled by the Defendant, testified as follows:

With reference to the number of passengers delivered daily by the M. K. & T. to the defendant on train No. 9 at Red River during September, October and November, 1910, I would state that a conservative estimate, based upon my personal knowledge, would be about 110 a day.

Cross-examination:

I did not state on cross examination that I could not give the estimate which I have just stated. I was asked if I could give the number of passengers delivered by the M. K. & T. to the defendant at Denison on train No. 9, and I stated that I could not, and I stated that I could not give the number delivered daily on all the trains. We have monthly records of all the business. I am making an estimate of the number delivered on No. 9. I have no independent recollection of the number on any one day, nor of the number on any one train. It is impossible to give a correct statement of the number of passengers on any one of the trains or on all four of them on any one day. In making my calculation a few minutes ago as to the number delivered on No. 9, I took five sleepers, estimated at ten passengers per sleeper; two chair-cars, which seat seventy-five persons each, and estimated twenty-five passengers to each car; then we had a smoking car and combination car, and I estimated

164 ten passengers in that car; that makes one hundred and ten.

I do not undertake to tell the Court that there were ten passengers in any one car. I am making a general estimate from my knowledge. I know positively that during the first year we operated the "Limited" we did a very heavy interstate business. Estimating ten passengers to a sleeper which will accommodate twenty-seven, twenty-five in a chair car that seats seventy, and ten in a coach seating eighty, is very conservative. As a matter of fact I don't know that there were that many passengers in those cars on those days; it is an estimate pure and simple. I never undertook before today to make any estimate in detail of the number of passengers on the train; I was first asked to do that just a few minutes ago. Before I came here I did not know that I was going to be asked about the number of passengers on the train. I can not take a pencil and paper and figure out how many passengers the Vandalia line carries in a month, because I am not familiar with it; I don't travel on it; it is my own business that I know.

Redirect examination:

Without reference to the number of passengers carried on the train and delivered to us, I can state it as a fact that the interstate business was large; in fact, it was beyond our expectations. After the train was in operation for several months I had a letter from the General Manager complimenting me upon the through business that we secured.

The defendant introduced in evidence a statement showing the number of local and interline state tickets sold and the revenue therefrom at each station between Austin and Denison, via both the Dallas and Fort Worth divisions, which statement is hereto attached & made part hereof. Said statement shows that for the month of
September, 1910, there were sold 76,036 tickets, with a
165 revenue of $118,925.10; for the month of October, 1910,
117,406 tickets, revenue $118,903.73; for November, 1910, 110,339 tickets, revenue $167,759.01. The last half of the sheet shows interline state tickets and the through revenue therefrom, being tickets sold on the defendant's line to go to points of destination on the line of some other railway company in Texas, the revenue shown being the total revenue received from the sale of such tickets, showing that for September, 1910, there were 2,145 tickets, with a revenue of $15,205.10; for October, 1910, 2,888 tickets, revenue $14,054.25; November 1910, 1,999 tickets, revenue $13,365.50.

Defendant rests.

The plaintiff introduced in evidence the census population of the several towns and stations along the line of the defendant from Denison to San Antonio, as shown in the Railroad Guide, the same being conceded to be the correct census populations of the said towns, as follows: Denison, 13,632; Whitewright, 1,563; Greenville, 8,850; Rockwall, 1,136; Garland, 804; Dallas, 92,104; Lancaster, 1,115; Waxahachie, 6,205; Italy, 1,149; Hillsboro, 6,115; West, 1,645; Waco, 26,425; Eddy, 1,000; Temple, 10,993; Bartlett,

1,815; Granger, 1,708; Georgetown, 3,096; Austin, 29,860; San Marcos, 4,071; New Braunfels, 3,165; San Antonio, 96,614; Whitesboro, 1,219; Tioga, 1,500; Pilot Point, 1,371; Denton, 4,732; Argyle, 400; Fort Worth, 73,312; Alvarado, 1,155; Grandview 1,018; Itaska, 1,356.

It was agreed that from September 8, 1910, to November 8, 1910, the defendant had regularly published schedules of passenger fares covering the transportation of passengers between points in Texas, as required by the Railroad Commission of Texas, and that
166 it had on file with the Interstate Commerce Commission regularly published schedules of passenger fares covering the transportation of passengers between points in Texas and points in Oklahoma, Kansas, Missouri, and other states of the Union.

It was agreed that time-card No. 43 of the defendant, which was in effect from September 8, 1910, to November 8, 1910, was during that period on file with the Railroad Commission of Texas.

It was agreed that during the period in controversy the defendant, whenever its passenger traffic was such as to justify or require it, operated additional sections of its trains Nos. 5, 205, 6, 206, 9, 209, 10 and 210; that in such cases the second section, when only one additional section was operated, took the same number and was operated on practically the same schedule as the first section of the train; that if a third train should have been required it would have been designated the third section of No. 5 or No. 6 or No. 9 or No. 209, as the case might be, and if a fourth section should have been required it would have been designated the fourth section of such train, and so on. The third and subsequent sections if any, would have been operated on the same track and would have followed substantially the same schedule as the first and second sections.

Statement Showing Number of Local and Interline State Tickets Sold and Revenue Therefrom at Each Station Between Austin and Denison, via Both Dallas and Ft. Worth Divisions, for September, October, and November, 1910.

Local Tickets and Revenue.

Stations.	Sept., 1910.		Oct., 1910.		Nov., 1910.	
	Tickets.	Revenue.	Tickets.	Revenue.	Tickets.	Revenue.
Abbott	699	576.05	1,444	1,140.95	933	812.05
Alvarado	720	530.50	886	833.35	976	1,006.75
Argyle	677	138.50	388	192.35	246	171.35
Aubrey	616	533.55	1,340	1,193.20	699	559.45
Austin C	964	885.00	551	3,383.30	552	2,460.30
Austin D	3,469	7,120.10	3,102	9,131.50	3,982	8,631.65
Bartlett	1,558	2,128.80	2,492	3,621.70	2,420	3,428.50
Bells	522	357.75	706	559.60	534	495.20
Bruceville	263	236.75	396	472.45	514	443.20
Burleson	472	299.45	566	414.50	514	394.15
Burrows	146	143.25	703	273.65	145	135.15
Caddo Mills	644	494.00	670	1,054.10	611	505.35
Celeste	1,164	851.95	1,931	1,381.40	1,471	1,224.45
Collinsville	421	316.50	846	755.80	482	405.70
Dallas C	315	2,850.45	251	5,738.99	2,188	8,117.25
Dallas D	7,760	14,639.20	10,061	22,126.90	13,638	25,155.40
Denison	3,077	4,764.80	3,705	9,232.05	3,523	6,419.06
Denton	1,877	2,964.30	5,441	6,485.70	2,508	3,357.20
Eddy	740	693.85	1,123	1,125.06	1,132	1,333.55
Egan	211	104.65	289	175.10	284	187.05
Elm Mott	100	130.75	160	178.80	161	72.40

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Statement Showing Number of Local and Interline State Tickets Sold and Revenue Therefrom at Each Station Between Austin and Denison, via Both Dallas and Ft. Worth Divisions, for September, October, and November, 1910.

Local Tickets and Revenue—Continued.

Stations.	Sept., 1910.		Oct., 1910.		Nov., 1910.	
	Tickets.	Revenue.	Tickets.	Revenue.	Tickets.	Revenue.
Fate	411	317.15	540	852.65	511	499.30
Forreston	493	328.95	552	671.00	530	521.85
Ft. Worth C.	239	1,586.35	201	1,845.75	605	379.75
Ft. Worth D.	4,827	14,584.30	7,578	13,337.50	8,624	16,758.25
Garland	1,869	697.45	2,244	1,310.75	1,165	796.90
Georgetown	1,178	1,949.15	1,934	3,374.70	2,052	3,267.95
Grand View	739	978.70	1,358	1,495.70	1,336	1,930.65
Granger	1,839	2,938.80	4,181	4,799.85	2,534	3,825.60
Greenville C.	38	89.40	83	86.35	57	309.60
Greenville D	4,493	7,057.50	9,162	11,435.80	6,528	7,833.80
Hagerman	132	73.20	182	155.35	99	95.05
168 Hammels Branch	129	95.55	379	414.53	290	296.80
Hewitt	219	112.05	275	161.95	248	178.85
Hillsboro	3,299	5,306.40	7,505	9,422.75	5,255	7,375.05
Holland	848	810.80	1,441	974.15	1,025	1,054.10
Italy	781	1,012.10	2,940	2,535.70	1,247	1,327.65
Itasca	1,022	1,430.85	846	2,082.95	2,395	2,385.05
Keller	339	225.70	456	298.25	200	289.80
Kingston	194	82.35	389	331.80	216	151.20
Lancaster	1,235	816.60	2,248	1,519.40	2,049	1,300.25
Leonard	1,028	703.70	2,051	2,062.30	1,126	1,059.75

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Little River	82	74.55	177	134.60	170	1,218.85
Lorena	875	708.50	2,090	1,312.35	1,387	1,158.60
Lovelace	184	138.60	324	137.30	153	121.35
Milford	690	712.50	1,225	1,598.30	885	1,007.15
Pflugerville	501	392.10	853	1,035.00	552	722.05
Pilot Point	732	1,040.50	1,487	1,851.90	902	1,323.40
Pottsboro	481	315.95	551	356.00	448	267.95
Roanoke	394	320.55	390	356.60	439	401.35
Red Oak	433	406.55	843	884.30	704	634.95
Rockwall	988	1,245.35	2,054	2,286.60	1,635	1,681.55
Rowlett	366	290.55	837	699.65	420	277.55
Royse	1,943	1,154.55	946	1,987.10	1,289	1,305.85
Sadler	232	189.75	538	249.45	281	150.40
Sprinkle	202	86.90	244	169.80	125	101.15
Sterrett	155	126.60	177	360.60	199	173.35
Temple	780	6,609.05	4,496	4,791.25	5,017	8,820.60
Tioga	565	507.40	1,229	620.30	578	371.55
Trenton	341	271.35	820	945.70	533	504.05
Troy	502	452.15	538	713.20	584	527.65
Waco C	126	1,196.10	648	1,653.90	491	2,456.70
Waco D	7,298	13,723.25	6,684	20,057.50	8,527	17,314.30
Watauga	72	43.60	74	31.20	79	32.25
Waxahachie	2,111	2,840.85	3,704	5,389.85	3,262	4,633.70
169 Weir	299	250.25	250	375.00	283	438.10
West	1,414	1,584.00	2,030	2,493.25	2,994	2,501.40
Whitesboro	1,853	1,433.45	1,683	2,031.95	1,771	1,497.30
Whitewright	650	853.25	919	1,741.45	1,026	1,163.55
	76,036	$118,925.10	117,406	$181,903.73	110,339	$167,759.01

Statement Showing Number of Local and Interline State Tickets Sold and Revenue Therefrom at Each Station Between Austin and Denison, via Both Dallas and Ft. Worth Divisions, for September, October, and November, 1910.—Continued.

Interline State Tickets and Through Revenue.

Stations.	Sept., 1910.		Oct., 1910.		Nov., 1910.	
	Tickets.	Revenue.	Tickets.	Revenue.	Tickets.	Revenue.
Abbott	1	6.00	2	30.00	....	.....
Alvarado	11	44.20	47	98.80	6	70.55
Argyle	....	.....	....	.....	....	.....
Aubrey	....	.....	....	.....	....	.....
Austin C	71	841.80	67	559.15	61	506.35
Austin D	194	1,472.25	161	1,174.10	153	1,082.20
Bartlett	59	364.70	35	183.85	30	156.45
Bells	1	10.20	2	3.55	5	21.90
Bruceville	1	6.85	....	.....	2	22.90
Burleson	....	.....	....	.....	....	.....
Burrows	....	.....	....	.....	....	.....
Caddo Mills	2	13.45	3	15.00	4	21.80
Celeste	8	95.40	26	190.70	20	154.40
Collinsville	....	.....	....	.....	....	.....
Dallas C	46	525.85	51	602.50	66	913.60
Dallas D	123	694.05	124	793.80	98	748.85
Denison	82	531.15	79	455.25	83	505.40
Denton	82	460.75	32	134.40	97	424.55
Eddy	....	.....	....	.....	....	.....
Egan	....	.....	20	26.30	....	.....
Elm Mott	....	.....	....	.....	....	.....

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Fate	....	.....	....	.....	....	.....
Forreston	....	.....	....	.....	....	.....
Fort Worth C	30	441.90	34	468.90	29	431.75
Fort Worth D	136	1,435.10	102	1,203.00	129	1,253.45
Garland	2	12.00	....	.....	12	189.55
Georgetown	80	505.65	103	650.20	102	745.70
170 Grand View	37	189.05	348	584.40	30	146.70
Granger	44	267.45	59	317.15	39	276.55
Greenville C	7	60.10	10	48.00	12	150.50
Greenville D	144	1,802.45	151	461.55	157	498.15
Hagerman	....	.....	....	.....	....	.....
Hammels Branch	....	.....	....	.....	....	.....
Hewitt	....	.....	3	16.20	....	.....
Hillsboro	161	790.00	121	725.00	136	836.75
Holland	20	110.00	26	196.15	9	41.70
Italy	4	16.75	3	15.10	5	27.65
Itasca	26	135.05	430	816.10	46	172.05
Keller	....	.....	....	.....	....	.....
Kingston	....	.....	....	.....	....	.....
Lancaster	1	7.35	1	12.55	5	95.75
Leonard	15	82.50	37	150.20	46	189.90
Little River	1	5.80	....	.....	....	.....
Lorena	3	16.55	7	69.80	10	96.20
Lovelace	....	.....	13	25.85	....	.....
Milford	14	35.25	17	28.90	2	4.35
Pflugerville	3	24.75	17	168.30	9	89.10
Pilot Point	1	15.15	7	48.15	7	108.95
Pottsboro	....	.....	....	.....	....	.....
Red Oak	....	.....	....	.....	....	.....

Statement Showing Number of Local and Interline State Tickets Sold and Revenue Therefrom at Each Station Between Austin and Denison, via Both Dallas and Ft. Worth Divisions, for September, October, and November, 1910.

Interline State Tickets and Through Revenue.—Continued.

Stations.	Sept., 1910.		Oct., 1910.		Nov., 1910.	
	Tickets.	Revenue.	Tickets.	Revenue.	Tickets.	Revenue.
Rockwall	2	6.15	1	5.35	9	46.05
Rowlett	....	.....	....	.....	....	.....
Royse	8	54.55	....	.....	....	.....
Sadler	....	.....	....	.....	....	.....
Sprinkle	....	.....	....	.....	....	.....
Sterrett	....	.....	....	.....	....	.....
Temple	168	676.70	174	903.35	90	511.90
Tioga	....	.....	....	.....	....	.....
Trenton	16	80.55	11	43.90	15	113.20
171 Troy	2	17.20	2	8.00	....	.....
Waco C	42	454.14	36	308.30	46	453.20
Waco D	340	2,076.50	314	1,931.45	265	1,680.25
Watauga	....	.....	....	.....	....	.....
Waxahachie	46	199.95	46	187.55	57	301.70
Weir	....	.....	....	.....	....	.....
West	20	131.20	16	82.15	9	48.15
Whitesboro	21	145.65	22	109.00	9	32.30
Whitewright	68	342.80	63	118.30	89	195.05
	2,145	$15,205.10	2,888	$14,054.25	1,999	$13,365.50

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The defendant offered in evidence "The Official Guide of the Railway and Steam Navigation Lines of the United States," containing, among other things, the following:

Missouri, Kansas & Texas Ry.

Equipment of Through Trains, Showing Arrangement of Pullman Sleeping Cars and Free Reclining Chair Cars. No Extra Fare.

"Southbound Trains.

No. 9. "The Katy Limited." Daily—10 Section Observation sleeping car St. Louis to San Antonio, via Ft. Worth. Drawing room sleeping car San Antonio to Chicago, via Dallas, St. Louis and C. & A. R. R. 12-Section Drawing room sleeping car St. Louis to Dallas. 12-Section Drawing Room sleeping car Kansas City to San Antonio, via Dallas. 12-Section Drawing room Sleeping car Kansas City to Houston, via Ft. Worth. 14-Section sleeping car Kansas City to Oklahoma City. Dining Car Kansas City to Parsons. Chair Car St. Louis to San Antonio, via Dallas, Chair Car Kansas City to Houston, via Ft. Worth.

Lve. St. Louis	10.05 a. m.	To-day
Lve. Kansas City	6.20 p. m.	"
Lve. Parsons	10.45 p. m.	"
Arr. Oklahoma City	7.00 a. m.	To-morrow
172 Arr. Muskogee	1.45 a. m.	"
Arr. McAlester	3.25 a. m.	"
Arr. Denison	6.10 a. m.	"
Arr. Dallas	9.15 a. m.	"
Arr. Ft. Worth	9.35 a. m.	"
Arr. Waco	12.55 Noon	"
Arr. Austin	4.55 p. m.	"
Arr. San Antonio	7.45 p. m.	"
Arr. Houston	9.55 p. m.	"

Northbound Trains.

No. 10. "The Katy Limited." Daily—Drawing-room Sleeping Car Chicago to San Antonio via C. & A. R. R. St. Louis and Dallas. 10-Section Observation Sleeping Car San Antonio to St. Louis, via Ft. Worth. 12-Section Drawing-room sleeping car San Antonio to Kansas City, via Dallas. 12-Section Drawing-room Sleeping Car Houston to Kansas City, via Ft. Worth. 12-Section Drawing-room Sleeping Car Dallas to St. Louis. Dining Car Parsons to Kansas City.

Chair Car San Antonio to St. Louis, via Dallas. Chair Car Houston to Kansas City, via Ft. Worth.

Lve. Houston	7.00 a. m.	To-day
Lve. San Antonio	10.00 a. m.	"
Lve. Austin	1.00 p. m.	"
Lve. Waco	4.40 p. m.	"
Lve. Ft. Worth	7.55 p. m.	"
Lve. Dallas	8.15 p. m.	"
Lve. Denison	1.25 p. m.	"
Lve. McAlester	2.08 a. m.	To-morrow
Lve. Muskogee	3.55 a. m.	"
Arr. Parsons	6.55 a. m.	"
Arr. Kansas City	11.15 a. m.	"
Arr. St. Louis	7.20 p. m.	"

173 *Table* 1.—*St. Louis and Denison, San Antonio, Houston, Galveston.—Table* 2.

9	Miles.	July 3, 1910.	10
A. M.		Leave. Arrive,	P. M.
10.05	0	St. Louis	7.20
10.55	27	Machens	6.25
.....	29	Black Walnut	.....
11.18	39	St. Charles	6.00
.....	55	Hamburg	.....
.....	61	Matson	.....
.....	66	Augusta	.....
.....	74	Dutzow	.....
.....	78	Marthasville	.....
.....	81	Peers	.....
.....	85	Treloar	.....
.....	89	Benheimer	.....
.....	94	Gore	.....
.....	97	Case	.....
.....	101	McKittrick	.....
.....	105	Rhineland	.....
.....	111	Bluffton	.....
.....	116	Portland	.....
.....	121	Steedman	.....
2.01	125	Mokane	3.40
.....	131	Tebbetts	.....
.....	138	Wainwright	.....
2.32	144	North Jefferson	2.46
		Ar. Jefferson City.	
.....	154	Hartsburg	.....
.....	158	Wilton	.....
.....	162	Rutland	.....
3.17	170	Arr. McBaine ..... Lve.	2.03
3.50	179	Arr. Columbia ..... lve.	1.25

174

Table 1.—*St. Louis and Denison, San Antonio, Houston, Galveston.*—*Table* 2.—Continued.

9 A. M.	Miles.	July 3, 1910. Leave.		Arrive.	10 P. M.
.....	172		Huntsdale		.....
.....	178		Rocheport		.....
.....	182		Lloyds		.....
3.49	188	Arr.	New Franklin	lve.	1.32
3.54	188	lve.	New Franklin	arr.	1.27
4.05	192		Boonville		1.15
4.27	203		Pilot Grove		12.53
.....	206		Harriston		.....
.....	209		Pleasant Green		.....
.....	216		Clifton City		.....
.....	221		Beaman		.....
5.15	227	Arr.	Sedalia	lve.	12.12
5.25	227	lve.	Sedalia	arr.	12.07
.....	239		Green Ridge		.....
.....	244		Kansas City Jn.		.....
5.58	248		Windsor		11.34
.....	256		Calhoun		.....
.....	260		Lewis		.....
6.28	267		Clinton		11.00
.....	273		Ladue		.....
.....	280		Montrose		.....
.....	286		Appleton City		.....
.....	294		Rockville		.....
.....	298		Schell City		.....
.....	304		Harwood		.....
.....	309		Walkers		9.50
8.15	317		Nevada		9.35
.....	327		Deerfield		.....
.....	331		Eve		.....
.....	337		Scott Junction		.....
8.50	338		Fort Scott		8.37
.....	351		Hiattville		.....
.....	358		Hepler		.....

175

.....	365		Walnut		.....
.....	373		St. Paul		.....
.....	380		South Mount		.....
10.10	387	Arr.	Parsons	Lve.	7.20
10.45	387	lve.	Parsons	Arr.	6.55
.....	396		Labette		.....
11.06	401		Oswego		6.33
11.20	410		Chetopa		6.18
.....	421		Welch		.....
.....	427		Blue Jacket		.....
.....	434		Kelso		.....

Table 1.—*St. Louis and Denison, San Antonio, Houston, Galveston.*—*Table* 2.—Continued.

9	Miles.	July 3, 1910.			10
A. M.		Leave.		Arrive.	P. M.
12.05	439		Vinita		5.37
.....	447		Big Cabin		.....
.....	454		Adair		.....
.....	464		Pryor		.....
.....	472		Chouteau		.....
.....	478		Mazie		.....
.....	487		North Wagoner		.....
1.20	488		Wagoner		4.20
.....	494		Gibson		.....
1.45	504	arr.	Muskogee	lve.	3.55
1.50	504	lve.	Muskogee	arr.	3.50
.....	517		Oaktaha		.....
.....	525		Checotah		.....
.....	538		Eufaula		.....
.....	547		Canadian		.....
.....	551		Crowder		.....
.....	564		No. McAlester		.....
3.25	566	arr.	McAlester	lve.	2.08
3.25	566	lve.	McAlester	arr.	2.08
.....	576		Johnsville		.....
.....	583		Kiowa		.....
176					
.....	594		Chockie		.....
.....	603		Stringtown		.....
4.30	610		Atoka		1.00
.....	621		Caney		.....
.....	630		Caddo		.....
5.29	641		Durant		12.01
.....	646		Cale		.....
.....	653		Colbert		.....
6.10	661	arr.	Denison	lve.	11.25
6.25	661	lve.	Denison	arr.	11.10
9.15	767	arr.	Dallas	lve.	8.15
10.35	798	arr.	Waxahachie	lve.	7.07
11.45	833	arr.	Hillsboro	lve.	6.05
A. M.					P. M.
6.25	661	lve.	Denison	arr.	11.05
7.10	686	arr.	Whitesboro	lve.	10.15
8.25	722	arr.	Denton	lve.	9.04
9.35	757	arr.	Ft. Worth	lve.	7.55
11.45	812	arr.	Hillsboro	lve.	6.05
11.55	812	lve.	Hillsboro	arr.	5.45
12.55	846	arr.	Waco	lve.	4.40
2.00	880	arr.	Temple	lve.	3.40
2.50	908	arr.	Granger	lve.	2.50

Table 1.—*St. Louis and Denison, San Antonio, Houston, Galveston.—Table* 2.—Continued.

9 P. M.	Miles.	July 3, 1910.			10 P. M.
3.15	908	lve.	Granger	arr.	2.40
4.55	956	arr.	Austin	lve.	1.00
6.10	986	arr.	San Marcos	lve.	11.30
6.45	1003	arr.	New Braunfels	lve.	10.57
7.54	1034	arr.	San Antonio	lve.	10.00
3.20	908	lve.	Granger	arr.	1.45
3.45	919	arr.	Taylor	lve.	1.20
5.35	969	arr.	Smithville	lve.	11.25
9.55	1084	arr.	Houston	lve.	7.00
.....	1134		Galveston	lve.	4.10
P. M.					A. M.

177 *Table* 11.—*Denison, Dallas, Ft. Worth, Waco, Austin, San Antonio, Houston and Galveston.—Table* 12.

9 A. M.	Miles.	July 3, 1910. Leave.	Arrive,	10 P. M.
10.05	..	St. Louis		7.20
P. M.		Leave.	Arrive,	A. M.
6.20	..	Kansas City		11.15
A. M.		Leave.	Arrive,	P. M.
6.25	0	Denison		11.10
.....	13	Bells		.....
.....	20	Whitewright		.....
.....	27	Trenton		.....
.....	34	Leonard		.....
.....	40	Celeste		.....
.....	43	Kingston		.....
.....	47	Kellogg		.....
.....	50	Peniel		.....
7.45	52	Greenville		9.45
.....	61	Caddo Mills		.....
.....	66	Burrow		.....
.....	69	Royse City		.....
.....	73	Fate		.....
8.23	78	Rockwall		9.02
.....	81	Hagan		.....
.....	86	Rowlett		.....
8.41	90	Garland		.....
.....	99	Fisher		.....
9.15	106	arr.	Dallas	lve.	8.15
9.40	106	lve.	Dallas	arr.	8.05
.....	112		Honey Springs		.....
10.06	121		Lancaster		7.36

Table 11.—*Denison, Dallas, Ft. Worth, Waco, Austin, San Antonio, Houston and Galveston.*—*Table* 12.—Continued.

9	Miles.	July 3, 1910.			10
A. M.		Leave.		Arrive,	P. M.
.....	126		Red Oak		.....
.....	130		Sterrett		.....
10.35	137		Waxahachie		7.07
178					
.....	146		Forreston		.....
.....	152		Italy		.....
.....	157		Milford		.....
.....	165		Lakenon		.....
11.45	172	arr.	Hillsboro	lve.	6.05
A. M.		(Via Ft. Worth.)			P. M.
6.25	661	lve.	Denison	arr.	11.05
.....	670		Pottsboro		.....
.....	675		Hagerman		.....
.....	682		Sadler		.....
7.15	686		Whitesboro		10.15
.....	692		Collinsville		.....
.....	699		Tioga		.....
7.49	704		Pilot Point		9.37
.....	711		Aubrey		.....
.....	717		Mingo		.....
8.25	722		Denton		9.04
.. .	729		Argyle		.....
.....	738		Roanoke		.....
.....	743		Keller		.....
.....	748		Watauga		.....
.....	753		Hodge		.....
9.35	757	arr.	Ft. Worth	lve.	7.55
10.00	757	lve.	Ft. Worth	arr.	7.40
.....	765		Bethel		.....
.....	771		Burleson		.....
10.45	778		Egan		7.03
10.55	784		Alvarado		6.53
.....	788		Conley		.....
.....	793		Grand View		.....
.....	801		Itasca		.....
11.45	812	arr.	Hillsboro	lve.	6.05
11.55	812	lve.	Hillsboro		5.45
.....	822		Abbott		.....
.....	827		West		.....
179					
.....	836		Elm Mott		.....
12.55	846	arr.	Waco	lve.	4.40
12.55	846	lve.	Waco	arr.	4.40
.....	853		Hewitt		.....

Table 11.—*Denison, Dallas, Ft. Worth, Waco, Austin, San Antonio, Houston and Galveston.—Table* 12.—Continued.

9 P. M.	Miles.	July 3, 1910. Leave.		Arrive.	10 P. M.
.....	858		Lorena	.....	.....
.....	863		Bruceville	.....	.....
.....	**865**		Eddy	.....	.....
.....	872		Troy	.....	.....
2.00	880	arr.	Temple	lve.	3.40
2.00	880	lve.	Temple	arr.	3.40
.....	888		Little River	.....	.....
.....	892		Sparks	.....	.....
.....	897		Holland	.....	.....
.....	903		Bartlett	.....	.....
2.50	908	arr.	Granger	lve.	2.50
3.15	908	lve.	Granger	arr.	2.40
.....	917		Weir	.....	.....
.....	919		Katy Lake	.....	.....
3.47	923		Georgetown	.....	2.10
.....	932		Burkland	.....	.....
.....	938		Pflugerville	.....	.....
.....	941		Dessau	.....	.....
.....	944		Sprinkle	.....	.....
4.55	956	arr.	Austin	lve.	1.00
5.00	956	lve.	Austin	arr.	12.38
6.10	986		San Marcos	.....	11.30
6.45	1003		New Braunfels	.....	10.57
7.45 P. M.	1034		San Antonio	.....	10.00 A. M.

It is agreed that the foregoing on 68 pages is a full, true and correct statement of all the facts proved and evidence introduced on the trial of said cause No. 28,684, The State of Texas vs. Missouri, Kansas & Texas Railway Company of Texas, in the District Court of Travis County, Fifty-third Judicial District, at the April term, 1912.

180

JEWEL P. LIGHTFOOT,
Attorney General;
JOHN W. BRADY,
E. B. ROBERTSON,
Attorneys for Plaintiff.
ALEX S. COKE,
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Attorneys for Defendant.

(Endorsed:) Examined and approved and ordered filed. Geo. Calhoun, Judge Fifty-third Judicial District. With No. 5159. Filed in the Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Oct. 4, 1912. R. H. Connerly, Clerk.

181 *Judgment of Court of Civil Appeals, Rendered April 9th, 1913.*

No. 5159.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS
vs.
THE STATE OF TEXAS.

Appeal from District Court of Travis County.

Opinion by Associate Justice Rice.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court that there was error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and here rendered, so that the appellee, the State of Texas, take nothing by its suit against the appellant, The Missouri, Kansas & Texas Railway Company of Texas, but that it, said appellant, go hence without day and do have and recover of and from said appellee, the State of Texas, all costs in this behalf expended, both in this court and in the court below and that this decision be certified below for observance.

Opinion of Court of Civil Appeals.

No. 5159.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from the District Court of Travis County.

Opinion.

As appellant's statement of the nature and result of the suit is concurred in by appellee, the same will be adopted, and is as follows: "This suit was instituted by the State of Texas against appellant to recover penalties aggregating $400,000, on account of 80 alleged violations of passenger circular No. 18, issued by the Railroad Commission of Texas, relating to the running of
182 passenger trains on schedule time, commonly called "the thirty minute order," said violations occurring between September 8th, 1910 and November 8th, 1910.

A trial before the court resulted in a judgment against appellant for $14,000, from which this appeal is prosecuted. Said circular No. 18 reads as follows: "Each and every railroad company oper-

ating a railroad in this state shall start its passenger trains from the points of origin in accordance with advertised schedule, and said trains except from unavoidable accident, thereto enroute, shall observe and conform to the published schedule as to arrival and departure at the several stations on the line; provided that trains may be held not to exceed thirty (30) minutes at origin or at junction points with other lines to make connection with trains on such other lines. If, after the expiration of said thirty minutes, connecting trains are in sight, ten minutes in addition to said thirty minutes will be allowed in which to make connection. Where connecting trains arrive within the time above allowed, a reasonable time in addition to that provided for, will be allowed for transfer of passengers, mail, express and baggage. Where connections are reliably reported to be more than thirty minutes late, no wait will be made."

Article 6552, Revised Statutes, 1911, (Art. 4494 R. S. 1895) upon which said order is predicated, reads: "Every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time thereto, offer, or be offered for transportation at the place of starting and at junctions with other roads, and at sidings and at stopping places established for receiving and discharging way passengers and freights, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of the railroad companies to comply with the requirements of this article shall be deemed an abuse of their rights and privileges and subject to regulation and correction by the Railroad Commission."

183 Art. 6672 R. S. 1911, provides that "If any railroad company doing business in this state shall hereafter violate any other provisions of this chapter, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not been provided by law, or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Railroad Commission of Texas, for every such act of violation it shall pay to the State of Texas a penalty of not more than five thousand dollars."

Appellee charged that it was appellant's duty to operate its passenger trains Nos. 9 and 209, commonly called the "Katy Limited" in accordance with said circular and that upon eighty different occasions, specially set out, it had failed to do so, praying for a penalty against it in the sum of $5,000, for each alleged violation.

Replying appellant urged a general demurrer; likewise admitted certain facts alleged and a general denial of others and specially plead that the circular of said railroad commission did not apply to it by reason of the fact that it was engaged in interstate commerce carrying passengers and freight between points in said state and points in Oklahoma, Kansas, Missouri and other states of the United States and foreign countries; and that as such common carrier

was subject to and controlled by the interstate commerce act of February 4th, 1887 and amendments thereto; that trains Nos. 9 and 209 are composed of trains made up in St. Louis and Kansas City, Missouri, and operated by the Missouri, Kansas & Texas Railway Company, to Parsons, Kansas, where they were consolidated and operated as one train to Denison, Texas, from which point it was, without change, except of engines and crews, operated by defendant under contract with the last named railroad company, as trains Nos. 9 and 209, via Dallas and Ft. Worth to Hillsboro, and thence as one train to Granger, where it separated, one branch going to Galveston and the other to San Antonio. A corresponding North-bound train, also popularly called the "Katy Limited," and designated by defendant and said railway company as train No. 10, except the part thereof operated between Hillsboro and Denison, via Ft. Worth, which is called train No. 210, has also since said date been daily operated by them to points outside of Texas
184 on the line of the M., K. & T. Railway.

It was likewise alleged and shown that appellant furnished ample accommodation for intra-state traffic, independent of said trains Nos. 9 and 209, on and over its line south of Denison; and that while said trains 9 and 209 stopped and took on and discharged passengers at various points along its line from Denison south, still, that about seventy per cent of the passenger traffic was interstate. That they also published and advertised said trains as being through trains, affording continuous passage from St. Louis and Kansas City to San Antonio and other points in Texas and as such being engaged in interstate commerce. The material facts of said plea were sustained by the record.

It is contended on the part of appellant that said circular No. 18 is not applicable to trains Nos. 9 and 209, for the reason that the same would be a regulation of, a burden upon and an interference with interstate commerce. It clearly appears that the trains involved in this case were operated between St. Louis and Kansas City, Missouri, and San Antonio, Texas, under an agreement between appellant and the Missouri, Kansas & Texas Railway Company, whose lines connected at Red River, five miles north of Denison. These trains were intended to and did accom-odate interstate traffic; and under the agreement and contract between appellant and the Missouri, Kansas & Texas Railway Company, the latter was obligated to deliver the south-bound trains to appellant at Red River and appellant was obligated to handle them through to destination; and appellant was obligated to deliver the north bound trains to said company at Red River, and the other was bound to handle them through to St. Louis and Kansas City.

By its proposition under its several assignments, appellant insists that a through passenger train, operated by two railway companies under an agreement between points in different states is an instrumentality and facility of carriage within the meaning of the act to regulate commerce, the jurisdiction to regulate and control
185 which lies with the Interstate Commerce Commission, and not with the Railroad Commission of Texas. We agree with

this contention, and hold that since it clearly appears from the record that the trains involved in this contention were engaged in interstate commerce at the times in question, that the order of the commission was not applicable to them and sustain appellant's several assignments raising this question. See Interstate Commerce Act, Secs. 1 and 15 as amended, Vol. 1, Drinker; Southern Railway Co. vs. United States, 222 U. S. 20; B. & O. R. R. Co. vs. Interstate Commerce Commission, 221 U. S. 612; Southern Railway Co. vs. Reed, 222 U. S., 424; Southern Railway Co. vs. Read & Beem, 222 U. S. 444; 2 Employers' Liability Cases, 223 U. S., 1; Adams Express Co. vs. Croninger, decided Jan'y 6th, 1913; C. B. & Q. Ry. Co. vs. Miller, decided Jan. 6th, 1913; C. R. I. & P. Ry. Co. vs. Hardwick Farmers Elevator Co. decided Jan'y 6th, 1913; also U. S. vs. Union Stock Yards & Transit Co., and Chicago Junction Railway Co. vs. United States, decided January 15th, 1913, reported in U. S. Sup. C'rt Advance sheets.

Appellant likewise contends by its several propositions that where a railroad Company has already provided ample facilities for the adequate accommodation of the traveling public, such as may be proper and reasonable at any given point, and operates, in addition thereto, through trains for the accommodation of interstate passengers, an act of the State legislature or railroad commission affecting the operation of said through trains is a burden upon and an interference with interstate commerce, and this contention seems to be supported by the authorities. See Herndon vs. C. R. I. & P. Ry. Co. 218 U. S. 135; Atlantic Coast Line vs. Wharton, 207 U. S., 327; Mississippi Railroad Commission vs. Illinois Central R. R., 203 U. S. 355; Big 4 vs. Illinois, 177 U. S., 574; L. S. & M. S. Ry. Co. vs. Ohio, 173 U. S. 283; Gladson vs. Minnesota, 166 U. S. 427; Illinois Central R. R. vs. Illinois, 163 U. S. 142.

The uncontradicted evidence, we think, amply sustains appellant's contention that during the period in controversy it furnished ample facilities, independent of said through trains, for the accommodation of its passenger traffic on its lines south of Denison, in that it had three passenger trains each way daily between Denison and
186 Hillsboro, via Dallas and Ft. Worth; three passenger trains each way daily between Hillsboro and Granger, and two passenger trains each way daily between Granger and San Antonio, in addition to said trains Nos. 9 and 209, or a total of four trains each way daily between Denison and Granger, and three trains each way daily between Granger and San Antonio,—two of the additional trains between Denison and Granger stopping each way daily at all regular stations, and one of them between Granger and San Antonio.

The chief complaint on the part of appellee was that appellant failed to run said trains Nos. 9 and 209 out of Denison on schedule time. It will be observed that the order of the commission only requires railroad companies operating in this state to start their passenger trains from the points of origin in accordance with their advertised schedules. Can it be said that Denison was the point of origin of said trains above referred to? We think not. These trains,

it clearly appears from the evidence were made up and started from Kansas City and St. Louis, respectively and thence operated and delivered to appellant by said M., K. & T. Railway Company at Denison, from which point appellant forwarded them, as through trains, under contract, over its lines; so that we think it must be regarded as one continuous train, with its point of origin at Kansas City and St. Louis, and that appellant was merely forwarding same upon its arrival at Denison, in accordance with and by virtue of its contract, and that the failure of said trains to arrive and depart from Denison in accordance with schedule time was not a violation either of the letter or spirit of said order No. 18.

These holdings render it, we think, unnecessary to discuss the various other assignments presented in appellant's brief.

Believing as we do, that the findings of the court to the effect that the appellant has failed to comply with the order of the commission, as set forth in circular No. 18 cannot be sustained for the reasons heretofore set forth; and that appellant is not subject to the penalty imposed upon it because at the time of the alleged violations of said order, it was engaged in interstate commerce, which
187 is not the subject of regulation by said commission, it becomes our duty to reverse and render the judgment of the trial court in favor of appellant, which is accordingly done. Reversed and Rendered.

B. H. RICE,
Associate-Justice.

Filed April 11, 1913.

(NOTE BY CLERK.—The case was decided April 9th, 1913.)

(Endorsed:) Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Tex., Apr. 11, 1913. R. H. Connerly, Clerk.

188 In the Court of Civil Appeals, Third Supreme Judicial District, at Austin.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appellee's Motion for Rehearing.

To the Honorable Judges of said Circuit:

Comes now the State of Texas, appellee, in the above styled and numbered cause, and moves the court to set aside and hold for naught its judgment rendered therein on the 9th day of April, A. D. 1913, reversing and rendering the judgment of the district court of Travis County in said cause, and to grant appellee a rehearing therein, and

to affirm the judgment of the district court of Travis County, Texas, for the following reasons, towit:

1. The court of Civil Appeals erred in holding that appellant had furnished ample accommodations for its intra-state traffic independent of its trains Nos. 9 and 209,—involved in this controversy during the period in question.

Statement.

W. G. Crush, general passenger agent for appellant, testified that 75 per cent of the traffic of trains Nos. 9 and 209 was interstate traffic (S. F., p. 42) that an average of 110 interstate passengers were delivered to appellant at Denison daily to be transported south on Nos. 9 and 209. (S. F. p. 65.)

If 75 per cent of the traffic on these two trains amounted to 110 passengers, then 100 per cent of such traffic would amount to 160 passengers, and this number of passengers were handled by these two trains daily.

Exclusive of trains Nos. 9 and 209, appellant had two other south bound trains and four north bound trains corresponding in
189 equipment, capacity, etc., with Nos. 9 and 209, all of these trains being known as the Limited and the Flyer. (S. F. pp. 33, 40, 42.) Appellant also operated for a part or all of the distance between Austin, Texas and Denison, Texas, in both directions every day, fourteen other trains known as local trains. (S. F. pp. 27, 28, 29.)

Assuming that these local trains were equal in capacity and average traffic with Nos. 9 and 209, the total of twenty-two trains monthly would and could handle a total of 105,600 passengers.

One hundred and ten passengers daily or 3,300 passengers monthly were delivered to appellant at Denison, Texas, and transported by it south. During the month of November, 1910, appellant sold tickets to a total of 112,338 passengers between Austin, Texas, and Denison, Texas, in addition to the 3,300 passengers received by it at Denison (S. F., pp. 66, 68*a*, 68*b*) making a total of 115,638 passengers to be handled along this line between Denison, Texas, and Austin, Texas, during that month.

It is apparent then, that 10,038 passengers to whom appellant had sold tickets between these points had to walk or stay at home, or ride on trains that were greatly crowded, and this fact is sufficient to warrant the court in finding that the transportation facilities furnished by appellant were not adequate.

The result shown above would obtain if the transportation facilities furnished on the local trains were equal in capacity to those furnished on Nos. 9 and 209, but as a matter of fact, the record shows that the facilities on the local trains were much less extensive than those furnished on Nos. 9 and 209. Mr. Crush testified that the accommodation on the local trains were not anything like as good as No. 9. (S. F., p. 40). In addition to this the local trains carried no Pullman cars, except four of them carried one Pull-

190 man each north of Dallas and Fort Worth (S. F., p. 41) while Nos. 9 and 209 carried a total of five Pullmans and five cha-r cars. (S. F., pp. 3, 4 and 5.)

The record shows also that appellant often ran many of those trains in two or more sections to take care of its traffic. (S. F., p. 68.) Mr. Crush said that the interstate traffic was very large, and so large that he got a letter from the general manager complimenting him upon securing such a volume of business. (S. F., p. 66.) He also testified that appellant had as good a passenger traffic as any other road in Texas, and, comparatively speaking, a heavy traffic. (S. F., pp. 38-39.)

2. The Court of Civil Appeals erred in holding that about seventy per cent of the traffic on trains Nos. 9 and 209 was interstate traffic.

Statement.

The witness Crush testified that appellant had no statistics to show the intrastate and the intersate business separately by trains, that he estimated that from seventy to eighty per cent was interstate and the balance intrastate, that his own opinion was that about seventy five per cent of the traffic on the Katy Limited, northbound as well as southbound, was interstate business. (S. F., pp. 33-34.)

Mr. Crush testified that an average of 110 interstate passengers were delivered to appellant at Denison daily to be transported south on Nos. 9 and 209. (S. F., p. 65.) This would be 3,300 interstate passengers per month handled on these two trains. Appellant has two northbound trains called the Limited also, bearing Nos. 10 and 210, of like equipment and character. It also has train Nos. 5 and 205 southbound, and Nos. 6 and 206, northbound, called the "Flyers." All of these trains are similar in capacity and character to Nos. 9 and 209. (S. F., p. 33, 40, 42.) If the average number of interstate passengers carried by each of these trains daily was 110, as stated by Mr. Crush, then the eight trains would carry a total of 26,400 interstate passengers monthly.

During the period of time in controversy appellant was operating between Austin, Texas, and Denison, Texas, in both direc-
191 tions fourteen other passenger trains daily. (S. F., pp. 27, 28, 29.)

If 75 per cent of the passengers on Nos. 9 and 209 were interstate passengers, and totaled 110, then 100 per cent of the traffic on these trains would be 160 passengers. Assuming the local trains to be equal in capacity and average traffic to Nos. 9 and 209, the total of the twenty-two trains would and could handle monthly 105,600 passengers. But during the month of November, 1910, which appears to be an average month, appellant sold tickets to 112,338 passengers at its stations between Austin, Texas, and Denison, Texas. (S. F., pp. 55, 68*a*, 68*b*.) In addition it received 3,300 interstate passengers at Denison during the month, making a total of 115,638 passengers to be handled by appellant along its lines between Denison and Austin during that month.

If Mr. Crush's estimate was correct, then the Katy "Limited"

northbound and southbound would handle but 3,000 "local" passengers monthly, and the "Flyers" north and south, would handle 3,000. These eight trains would handle 26,400 interstate passengers monthly, or a total of 32,400 local and interstate passengers monthly. Assuming the local trains to be equal in capacity with the Limited and the Flyer and to carry nothing but local passengers to their full capacity, they would carry a total of 70,200 monthly, but as stated above, there were 115,638 passengers that had to be carried on the twenty-two trains, and 13,038 of these could not have been carried by them at all, if Mr. Crush's estimate was correct.

3. The Court of Civil Appeals erred in holding that the trains involved in this case were operated between St. Louis and Kansas City, Missouri, and San Antonio, Texas, and that the trains were made up and started from Kansas City and St. Louis respectively and thence operated and delivered to appellant by said M. K. & T. Railway Company at Denison, from which point appellant forwarded them as through trains over its lines, and that the trains must be regarded as one continuous train.

192 Statement.

In this statement the train north of Denison will be referred to as "Original No. 9." "Original No. 9" is made up of different parts or trains gathered from different sections of the country—one train originating at St. Louis, and another at Kansas City—and brought together at Parsons, Kansas. (S. F., p. 3.) From Parsons to Denison, "Original No. 9" is made up of ten cars. (Tr., p. 42.) "Original No. 9" is broken up at Denison and two trains Nos. 9 and 209, are operated out of Denison south, and one by way of Forth Worth, and one (No. 209) by way of Dallas to Hillsboro; frequently additional or different equipment is taken in at Denison. (S. F., pp. 3, 4, 5.) Between Denison and Hillsboro, No. 9 carries two mail, express and baggage cars, two passenger cars and two Pullmans; between those points No. 209 carries two mail, express and baggage cars, three "passenger" cars and three Pullmans—sometimes some of these cars are set out at Dallas; these two trains, therefore carry into Hillsboro a total of fourteen cars, being four mail, express and baggage cars, five passenger cars and five Pullmans; parts of these trains are combined at Hillsboro into one train operated from that point to Granger as No. 9, this train carrying two mail, express and baggage cars, three passenger cars, and four Pullmans, a total of nine cars; it is not shown that no new or different equipment is picked up at Hillsboro, but assuming this as a fact, it appears that two of the mail, baggage and express cars, two of the passenger cars, and one of the Pullmans, brought into Hillsboro by Nos. 9 and 209, are left there. (S. *E.*, pp. 3, 4, 5.) At Granger No. 9 is again broken up and two of its mail, express and baggage cars two of its passenger cars, and three of its Pullmans are from that point operated in one train over a branch line into Austin, and one of its passenger cars and one of its Pullmans are left at Granger to be carried thence, by another train, to Houston. (S. F., pp. 3, 4, 4.)

193 The distance from Denison to San Antonio via Dallas, plus the distance from Denison to Hillsboro via Fort

Worth, is 549 miles. (S. F., p. 36.) The schedule time for the trains between Denison and San Antonio, via Dallas is thirteen hours (S. F., p. 36) and between Denison and Hillsboro is five hours and twenty minutes. (Tr. p. 11; S. F., p. 1). The schedule time is therefore thirty miles per hour. Passengers were let off and taken on, at from, and between these points. (S. F., p. 42.)

These trains furnished sleeper accommodations for passengers between Texas points (S. F., 42).

The passenger trains of appellant called local trains, carried sleepers between Fort Worth and Dallas and Kansas City and St. Louis, (S. F., 41). These local trains carry the same equipment, except as to the Pullmans, as Nos. 9 and 209. (S. F., pp. 47, 54.)

Trains Nos. 5, 205, 6 and 206, the Flyers, are trains heavily patronized by intrastate passengers, and Mr. Crush, general passenger agent for appellant, said these trains were just as much interstate trains as are Nos. 9 and 209. (S. F., p. 42.)

The appellant did not plead that the train was exclusively a "through interstate trains" (Tr. p. 32) but alleged that it is operated primarily for the accommodation and benefit of interstate passengers "although passengers between points in Texas have been carried thereon when boarding the same at regular stops therefor with transportation to other regular stops." (Tr. p. 42.)

4. The Court of Civil Appeals erred in holding that Denison, or the state line, was not the point of origin or the starting place of the trains in question, within the meaning of Passenger Circular No. 18,—because in law and in fact the state line is per force the starting point of all trains operated by a railway company incorporated under the laws of the State of Texas.

Statement.

In the agreed statement of facts read in evidence No. 9 is designated "defendant's passenger train No. 9", and No. 209 is designated as "its (defendant's) passenger train No. 209" (S. F., pp. 2 and 4) "that the M. K. & T. Railway Company's train No. 9 from the north was usually composed of about ten cars, some of which when the train reached Denison were placed in the Defendant's Train No. 9 and carried south via Dallas to Hillsboro, the remainder being placed in Defendant's Train No. 209 at Denison and run south via Fort Worth to Hillsboro, at which last named place the cars so operated via Dallas and via Fort Worth were again combined into a single train which was operated over defendant's line to the city of Austin * * *. Other cars were picked up at Denison and made a part of Defendant's Trains Nos. 9 and 209 from time to time as necessary * * * one or two (of the cars of 209) are generally set out at Dallas". (S. F., p. 4.) Trains Nos. 9 and 209 carried into Hillsboro a total of thirteen cars, and the train from Hillsboro south carried nine cars (S. F. p. 4); necessarily four cars were set out at Hilisboro; "The crews of No. 9 from the north did not come south of Denison, new Crews being secured there for Defendant's Trains Nos. 9 and 209, and new en-

194

gines were secured there for defendant's Trains Nos. 9 and 209, and new engines were secured at Denison for Said Trains". (S. F., p. 5.)

The defendant admitted that it is a railroad corporation organized and existing under the laws of the state of Texas; that it owns and operates a line of railroad in the state of Texas, extending from the state line and the city of Denison southward through the cities named in the petition; that on the dates in question it operated a passenger train known and designated as train No. 9 on and upon its said line of railroad and from said city of Denison to said city of Austin, and which passes to and through said cities of Dallas, Hillsboro and Granger aforesaid. That defendant also owns and operates a line of railroad from the city of Denison to and through the cities of Whitesboro, etc. * * * Defendant operated a passenger train known and designated as train No. 209 on and upon its said line of railroad and from said city of Denison to and through said cities of Whitesboro and Fort Worth and to said city of Hillsboro aforesaid. (Statement of Facts, page 2; Transcript pages 2 and 3.)

195 The state alleged and the defendant admitted it to be true that during the times in question "defendant's said passenger trains No. 9 was, by defendant's published and advertised schedule, due to daily arrive at and depart from said regular station at Denison, Dallas, Hillsboro, Granger and Austin on defendant's said line of railroad as follows: Leave Denison at 6:25 o'clock a. m., arrive at Dallas at 9:15 o'clock a. m. and depart therefrom at 9:40 o'clock a. m. etc."

That "Defendant's said passenger train No. 209 was by defendant's published and advertised schedule due to arrive and depart daily from said regular stations at Denison, Whitesboro, Fort Worth and Hillsboro on defendant's said line of railroad as follows: "Leave Denison at 6:25 o'clock a. m.; to arrive at Whitesboro at 7.10 o'clock a. m. and depart therefrom at 7:15 o'clock A. M. etc." (S. F., pages 2 and 3 Tr. pp. 10 and 11.)

Authorities.

Railroad Commission vs. C. R. I. & G. Ry. Co., 102 Tex. 397-8.

5. The Court of Civil Appeals erred in sustaining and in not overruling appeliant's assignment of error No. 20 and the propositions thereunder, which read as follows:

Twentieth Assignment.

(No. 22 in Transcript.)

The court erred in its 19th conclusion of fact, which is as follows: "That defendant's Nos. 9 and 209 were inaugurated and put in service for the purpose of connecting at Denison, Texas, with Train

No. 9 of the M. K. & T. Railway Company from Kansas City and St. Louis, and that these trains of defendant carried both interstate and intrastate passengers, but the evidence fails to disclose the proportional part of interstate and intrastate passengers carried by said trains during said period of time in controversy", because the evidence shows distinctly that defendant's Train Nos. 9 and 209 was inaugurated and put in service jointly with the Missouri,
196 Kansas & Texas Railway Company for the purpose of establishing and operating a through interstate route for the transportation of passengers, baggage, mail and express between St. Louis and Kansas City, Missouri, on the north and San Antonio, Texas, on the south, and intermediate and interstate points, and that at least seventy per cent of the passengers carried on defendant's train Nos. 9 and 209 were interstate passengers.

Proposition—Twentieth Assignment.

This assignment is submitted as a proposition.

Statement.

The witness Crush testified that appellant had no statistics to show the intrastate and the interstate business separately by trains, that he estimated that from seventy to eighty per cent was interstate and the balance intrastate, that his own opinion was that about seventy five per cent of the traffic on the Katy Limited, northbound as well as southbound, was interstate business. (S. F., p. 33-34.)

Mr. Crush testified that an average of 110 interstate passengers were delivered to appellant at Denison daily to be transported south on Nos. 9 and 209. S. F., p. 65). This would be 3,300 interstate passengers per month handled on these two trains. Appellant had two northbound trains called the Limited also, bearing Nos. 10 and 210, of like equipment and character. It also has trains Nos. 5 and 205 southbound, and Nos. 6 and 209, northbound, called the "Flyers". All of these trains are similar in capacity and character to Nos. 9 and 209. (S. F., pp. 33, 40, 42.) If the average number of interstate passengers carried by each of these trains daily was 110, as stated by Mr. Crush, then the eight trains would carry a total of 26,400 interstate passengers monthly.

During the period of time in controversy appellant was operating between Austin, Texas and Denison, Texas, in both directions, fourteen other passenger trains daily. (S. F., pp. 27, 28, 29.)

If 75 per cent of the passengers on Nos. 9 and 209 were interstate passengers, and totalled 110, then 100 per cent of the traffic on these trains would be 160 passengers. Assuming the local trains
197 to be equal in capacity and average traffic to Nos. 9 and 209, the total of the twenty-two trains would and could handle monthly 105,600 passengers. But during the month of November, 1910, which appears to be an average month, appellant sold tickets to 112,338 passengers at its stations between Austin, Texas and Denison, Texas. (S. F., pp. 66, 68*a*, 68*b*.) In addition it received 3,300

interstate passengers at Denison during the month making a total of 115,638 passengers to be handled by appellant along its lines between Denison and Austin during that month.

If Mr. Crush's estimate was correct, then the Katy "Limited" northbound and southbound would handle but 3,000 "local" passengers monthly, and the "Flyers" north and south, would handle 3,000. These eight trains would handle 26,400 interstate passengers monthly, or a total of 32,400 local and interstate passengers monthly. Assuming the local trains to be equal in capacity with the Limited and the Flyer and to carry nothing but local passengers to their full capacity, they would carry a total of 70,200 monthly, making a total for the twenty-two trains of 102,600 passengers monthly, but, as stated above, there were 115,638 passengers that had to be carried on the twenty-two trains, and 13,038 of these could not have been carried by them at all, if Mr. Crush's estimate was correct.

Authorities.

Ry. Co. vs. West, 102 S. W., 1174.
Ry. Co. vs. Coggin, 99 S. W., 431.
Ry. Co. vs. Gillespie, 106 S. W., 707.
Ry. Co. vs. Hadrant, 67 Tex., 503.
Turner vs. Meir, 70 S. W., 984.
Ry. Co. vs. Clark, 81 Tex., 48.
Armendaiz vs. Stillman, 67 Tex. 458.
Young vs. Ry. Co., 27 S. W., 14.

6. The Court erred in sustaining and in not overruling appellant's 21st assignment of error and the propositions thereunder, which read as follows:

198 Twenty-first Assignment.

(No. 34 in Transcript.)

The court erred in its sixth conclusion of law, which is as follows: "Said trains Nos. 9 and 209 of defendant were not engaged in interstate commerce, but both of said trains ran wholly within the State of Texas and their crews and a large part of their equipment were picked up at Denison and ran wholly within this state, and a large part of the passengers carried on said trains were intrastate passengers," because the evidence shows that train Nos. 9 and 209 did not run wholly within the State of Texas, but were parts of a through interstate train running from the state of Missouri, through the states of Kansas and Oklahoma to San Antonio in the State of Texas, and all of the equipment starting at the northern termini was carried through to destination, and a large part thereof was not picked up at Denison, nor were a large part of the passengers carried on said train intrastate passengers, but not more than thirty per cent thereof were such.

Statement.

In this statement the train north of Denison will be referred to as "Original No. 9." "Original No. 9" is made up of different parts or trains gathered from different sections of the country—one train originating at St. Louis, and another at Kansas City—and brought together at Parsons, Kansas. (S. F. p. 3.) From Parsons to Denison, "Original No. 9" is made up of ten cars. (Tr. p. 42.) "Original No. 9" is broken up at Denison and two trains, Nos. 9 and 209, are operated out of Denison south, and one by way of Fort Worth, and one (No. 209) by way of Dallas to Hillsboro; frequently additional or different equipment is taken in at Denison. (S. F., pp. 3, 4, 5.) Between Denison and Hillsboro, No. 9 carries two mail, express and baggage cars, two passenger cars and two Pullman; between those points No. 209 carries two mail, express and baggage cars, three "passenger" cars and three Pullmans—sometimes
199 some of these cars are set out at Dallas; these two trains, therefore, carry into Hillsboro a total of fourteen cars, being four mail, express and baggage cars, five passenger cars and five Pullmans; parts of these trains are combined at Hillsboro into one train operated from that point to Granger as No. 9, this train carrying two mail, express, and baggage cars, three passenger cars, and four Pullmans, a total of nine cars; it is not shown that no new or different equipment is picked up at Hillsboro, but assuming this as a fact, it appears that two of the mail, baggage and express cars, two of the passenger cars and one of the Pullmans, brought into Hillsboro by Nos. 9 and 209, are left there. (S. F. pp. 3, 4, 5.) At Granger No. 9 is again broken up, and two of its mail, express and baggage cars, two of its passenger cars, and three of its Pullmans are from that point operated in one train over a branch line into Austin, and one of its passenger cars and one of its Pullmans are left at Granger to be carried thence by another train, to Houston. (S. F., pp. 3, 4, 5.)

The Distance from Denison to San Antonio, via Dallas, plus the distance from Denison to Hillsboro, via Fort Worth, is 549 miles. (S. F., p. 36.) The schedule time for the trains between Denison and San Antonio via Dallas is thirteen hours, (S. F., p. 36) and between Denison and Hillsboro is five hours and twenty minutes. (Tr. p. 11, S. F., p. 1.) The schedule time is, therefore, thirty miles per hour. Passengers were let off and taken on at from, and between these points. (S. F., p. 42.)

These trains furnished sleeper accommodations for passengers between Texas points (S. F., p. 42.)

The passenger trains of appellant, called local trains, carried sleepers between Fort Worth and Dallas and Kansas City and St. Louis. (S. F., p. 41.) These local trains carry the same equipment except as to the Pullmans, as Nos. 9 and 209. (S. F., p. 47, 54.)

Trains Nos. 5, 205, 6 and 206, the Flyers, are trains heavily patronized by intrastate passengers, and Mr. Crush, general passenger

agent for appellant, said these trains were just as much inter-
200 state trains as are Nos. 9 and 209. (S. F., p. 42.)

The appellant did not plead that the train was exclusively a "through interstate train" (Tr. p. 32) but alleged that it is operated primarily for the accommodation and benefit of interstate passengers, "although passengers between points in Texas have been carried thereon when boarding the same at regular stops therefor with transportation to other regular stops." (Tr. p. 32.)

Authorities.

Oviatt vs. Ry Co., 43 Minn. 436: "A through freight train is a train which does not switch, and neither sets out, nor takes in, cars at interstate stations."

Ry. Co. vs. Illinois, 177 U. S., 514: "A through interstate train is one used exclusively for interstate traffic from and to points without the state of Illinois."

Ry. Co. vs. Ohio, 173 U. S. 285.

7. The court erred in sustaining and in not overruling appellant's 22nd, 23rd and 24th assignments of error, and the propositions thereunder, which read as follows:

Twenty-second Assignment.

(— 27 in Transcript.)

The court erred in its first conclusion of law, which is as follows: "The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid," because said defendant's train Nos. 9 and 209 is a through interstate train to which said order has no application.

Twenty-third Assignment.

(No. 28 in Transcript.)

The court erred in its first conclusion of law, which is as follows: "The order of the Railroad Commission of Texas, known as Passenger Circular No. 18 containing said Rule 2 is valid," because defendant's train Nos. 9 and 209 is a through interstate train to which the statute on which said passenger Circular No. 18 is based, towit,
Article 4494 of the Revised Statutes of Texas, has no applica-
201 tion, and said Circular is therefore unauthorized and void.

Twenty-fourth Assignment.

(No. 29 in Transcript.)

The court erred in its first conclusion of law, which is as follows: "The order of the Railroad Commission of Texas known as Pas-

senger Circular No. 18 containing said Rule 2 is valid," because said defendant's train Nos. 9 and 209 is a through interstate train, and cannot, under the evidence, be brought under the terms of said circular or the statute upon which it is based, towit article 4494 of the Revised Statutes of Texas, and as applied to said train said statute and said circular are void.

First Proposition—Twenty-second, Twenty-third, and Twenty-fourth Assignments.

Article 6552, Revised Statutes, does not apply to through trains operated between points in Texas and points in other states primarily for the accommodation of interstate passengers.

Second Proposition—Twenty-second, Twenty-third, and Twenty-fourth Assignments.

Passenger circular No. 18, does not apply to trains Nos. 9 and 209, they being through trains operated between points in Texas and points in other states inaugurated primarily for the accommodation of interstate traffic.

Second (Third?) Proposition—Twenty-second, Twenty-third, and Twenty-fourth Assignments.

A state statute requiring railroad companies to have fixed schedules for the operation of their trains and to operate the same in accordance therewith is void when applied to a through train operated by agreement between two railway companies between points in different states primarily for the accommodation of interstate traffic and of whose traffic about seventy per cent is interstate. Such statute, so construed, is a regulation of, an interference with and a burden upon interstate commerce.

202 Third (Fourth?) Proposition—Twenty-second, Twenty-third, and Twenty-fourth Assignments.

An order of a state railroad commission requiring railroad companies to have a fixed schedule for their passenger trains and to operate the same in accordance with such schedules, barring unavoidable accidents, is void when applied to a through train operated between points in different states under agreement between two railroad companies primarily for the accommodation of interstate passengers and of whose traffic about seventy per cent is interstate.

Statement.

(Statement made under 6th paragraph above is here adopted as a statement.)

8. The court erred in overruling and in not sustaining appellant's 25th assignment of error and proposition thereunder, which read as follows:—

Twenty-fifth Assignment.

(No. 30 in Transcript.)

The court erred in its second conclusion of law, which is as follows: "Said order of the Railroad Commission is not a regulation of interstate commerce, nor is it an interference with or burden upon such commerce, but rather tends to facilitate both intrastate and interstate commerce, and promotes the convenience of the traveling public," because under the facts of this case and as applied by the court the said order of the Railroad Commission operates as and is a regulation of interstate commerce and operates as and is an interference therewith and a burden thereon, and it does not tend to facilitate interstate commerce or promote the convenience of the traveling public.

Proposition—Twenty-fifth Assignment.

This assignment is submitted as a proposition.

Statement.

(The statement made under paragraph 6 above is here adopted as a statement.)

203 9. The court erred in sustaining and not overruling appellant's 26th assignment of error and proposition thereunder, which read as follows, to-wit:

Twenty-sixth Assignment.

(No. 31 in Transcript.)

The court erred in its third conclusion of law which is as follows: "Whatever effect said order may have on interstate commerce is only incidental, and then only on account of a violation thereof by defendant," because under the uncontroverted facts in this case the interference with and regulation of interstate commerce and the burden imposed upon interstate commerce by said order is palpable and direct, and not in any wise incidental.

Proposition—Twenty-sixth Assignment.

This assignment is submitted as a proposition.

Statement.

(The statement made under paragraph 6 above is here adopted as a statement.)

10. The court erred in sustaining and in not overruling appellant's 27th, 28th, 29th and 30th assignments of error and propositions thereunder, which read as follows, to-wit:

Twenty-seventh Assignment.

(No. 4 in Transcript.)

In this case the evidence showed that by agreement the Missouri, Kansas & Texas Railway Company, a Kansas corporation, and this defendant, a Texas corporation, established, equipped, advertised and had in operation in September, October and November, 1910, a through interstate route for the transportation of passengers, baggage, mail and express over their respective lines between the cities of St. Louis and Kansas City, in the State of Missouri, on the north, and the city of San Antonio, Texas, on the south, and intermediate interstate points, the line of railway of the Missouri, Kansas & Texas Railway Company extending from St. Louis and Kansas City in the State of Missouri through the states of Kansas and Oklahoma to Red River, or the Texas-Oklahoma state line, and the line of rail-
204 way of this defendant extending from said latter point into the state of Texas, and, among other points, to San Antonio, in said state; and that this defendant's train Nos. 9 and 209 and train Nos. 10 and 210, were facilities for and used exclusively in the operation of such through interstate route, and as such were governed and controlled by the following provision of section 1 of the Federal Act to regulate commerce, as amended June 18th, 1910, to-wit: "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing or storage, and the handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and establish through routes and just and reasonable rates applicable thereto; to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto." That because of this provision and the provisions of section 15 of the Act which give the Interstate Commerce Commission authorities to establish through routes, and to make rules and regulations for the operation thereof, the said trains hereinbefore mentioned and the operation thereof, the same being through interstate trains primarily established for the benefit and convenience of interstate traffic, and almost exclusively

devoted to such traffic, as shown by the evidence, this defendant having provided ample local trains to care for its intrastate traffic, were under the jurisdiction of the Interstate Commerce Commission and subject to the control and regulation of the Acts of the Federal Congress relative to interstate commerce, and not subject to regulation by the Railroad Commission of the State of Texas, and the said order of the Railroad Commission of Texas upon which this suit is
205 based, known as Passenger Circular No. 18, is therefore an unwarrantable interference with interstate commerce and imposes a burden thereon contrary to the provisions of the Constitution of the United States delegating to the Federal Congress power to regulate and control interstate and foreign commerce. Because of the forego-ng matters set out in this paragraph the court erred in rendering judgment against this defendant.

Twenty-eighth Assignment.

(No. 5 in Transcript.)

In this case the evidence shows that Train Nos. 9 and 209, parts of No. 9 running south into Denison from the states of Missouri, Kansas and Oklahoma (and their counterparts, Nos. 10 and 210, running north from and out of the state of Texas into the states of Oklahoma, Kansas and Missouri), were established, equipped, advertised and operated in September, October and November, 1910, jointly by this defendant and the Missouri, Kansas & Texas Railway Company primarily for the benefit and convenience and for the transportation of interstate traffic, to-wit, passengers, baggage, mail and express, between St. Louis and Kansas City, Missouri, on the north, and San Antonio, Texas, on the south, and intermediate interstate points; that the equipment of such trains Nos. 9 and 209, consisting of baggage, mail and express cars, chair cars and coaches, and standard Pullman sleepers, was run through from San Antonio, Texas, and other Texas points, to St. Louis and Kansas City in the State of Missouri, and thereupon run from such northern termini to the terminus in Texas and back to the northern termini again, and so on continuously, and that at least seventy per cent of the traffic on said train Nos. 9 and 209 was interstate; that the said train Nos. 9 and 209 was a through interstate train and but a part and parcel of a through, continuous and interstate train designated as No. 9, operated from St. Louis and Kansas City, Missouri, through the states of Missouri, Kansas and Oklahoma into Denison, Texas, and points south thereof by the said Missouri, Kansas & Texas Railway Company and
206 this defendant, the former operating said train on its own tracks and under its own exclusive control to the Texas-Oklahoma state line, commonly known as Red River, and there delivering said train to this defendant, who owns and operates a line of railroad running south into Texas from the Texas-Oklahoma state line, as aforesaid, and this defendant operated the said train so delivered to it at the said state line into Denison and on to the south, the said train No. 9 at Denison being divided into two sections or parts,

one designated for convenience of operation No. 209, running south of Hillsboro, Texas, via Ft. Worth, and the other section continuing under the same designation of No. 9, running via Dallas to the said town of Hillsboro, at which latter point said train No. 209 was again consolidated with said train No. 9 and the latter thereupon proceeded south to its final destination at San Antonio, Texas, as aforesaid; that defendant's local and intrastate service outside of and independent of Nos. 9 and 209 has at all times been sufficient and ample for the needs of the public, and there has never been any necessity for an increase therein. Because of these facts the court erred in holding that the defendant was subject to the penalties for which judgment was rendered against it, or any of them, for the reason that the order of the railroad Commission of Texas, known as Passenger circular No. 18, upon which said penalties and judgment are based, by reason of the fact aforesaid, was and is an interference with and a regulation of interstate commerce, and a burden upon such commerce, all of which is inhibited by the Constitution of the United States which delegates to the Federal Congress the sole power to regulate interstate and foreign commerce.

Twenty-ninth Assignment.

(No. 21 in Transcript.)

The court erred in rendering judgment against this defendant because article 4494 of the Revised Statutes of Texas and Passenger Circular No. 18, made the foundation of this suit, are both
207 null and void as and when applied to defendant's trains Nos. 9 and 209 and the instrumentalities and facilities used in the operation thereof, the same, on account of its relation to and connection with interstate commerce, being subject to the control and regulation prescribed by the acts of Congress of the United States relative to interstate commerce, and, under the evidence, exempt from the control and operation of article 4494 of the Revised Statutes of Texas and the said Passenger Circular No. 18.

Thirtieth Assignment.

(No. 20 in Transcript.)

If the court was correct in holding that Passenger Circular No. 18, when properly construed, applied to defendant's train Nos. 9 and 209, and that as so construed the same was authorized by article 4494 of the Revised Statutes of Texas, then the court erred in not holding said order and statute void, because said train Nos. 9 and 209 and the instrumentalities and facilities used in the operation thereof was engaged in through-route interstate commerce, and by reason thereof subject to the regulation and control prescribed by the acts of the congress of the United States, and not subject to such regulation by the State of Texas through its legislature and Railroad Commission as prescribed and provided by said article 4494 of the Revised Statutes of Texas and Passenger Circular No. 18.

First Proposition—Twenty-seventh, Twenty-eighth, Twenty-ninth, and Thirtieth Assignments.

A through passenger train operated by two railway companies under agreement between points in different states is an instrumentality and facility of carriage within the meaning of the Act to regulate commerce, the jurisdiction to regulate and control which lies with the Interstate Commission and not with the Railroad Commission of Texas.

Second Proposition—Twenty-seventh, Twenty-eighth, Twenty-ninth, and Thirtieth Assignments of Error.

Where a railroad company has already provided ample facilities for the adequate accommodation of the traveling public, such
208 as may be proper and reasonable at any given point, and operates in addition thereto through trains for the accommodation of interstate passenger-, an act of a state legislature or of a railroad commission affecting the operation of such through trains is a burden upon and an interference with interstate commerce.

Third Proposition—Twenty-seventh, Twenty-eighth, Twenty-ninth, and Thirtieth Assignments.

An order of a railroad commission which requires the operation of an additional train when a through interstate train is late in reach- any station en route, or which in the alternative, imposes upon the carriers the duty of requiring the interstate passengers to wait at such station until the departure of the next regular train is a burden upon and an interference with interstate commerce.

Statement.

In this statement the train north of Denison will be referred to as "Original No. 9." "Original No. 9" is made up of different parts *or* trains gathered from different sections of the country—one train originating at St. Louis, and another at Kansas City—and brought together at Parsons, Kansas. (S. F., p. 3.) From Parsons to Denison, "Original No. 9" is made up of ten cars. (Tr., p. 42.) "Original No. 9" is broken up at Denison, and two trains Nos. 9 and 209, are operated out of Denison south, and one by way of Fort Worth, and one (No. 209) by way of Dallas to Hillsboro; frequently additional or different equipment is taken in at Denison. (S. F., pp. 3, 4, 5.) Between Denison and Hillsboro, No. 9 carries two mail, express and baggage cars, two passenger cars and two Pullmans; between those points No. 209 carries two mail, express and baggage cars, three "passenger" cars and three Pullmans—sometimes some of these cars are set out at Dallas; these two trains, therefore, carry into Hillsboro a total of fourteen cars, being four mail, express and baggage cars, five passenger cars and five Pullmans; parts of these trains are combined

at Hillsboro into one train operated from that point to
209 Granger as No. 9, this train carrying two mail, express and baggage cars, three passenger cars, and four Pullmans, a total of nine cars; it is not shown that no new or different equipment is picked up at Hillsboro, but, assuming this as a fact, it appears that two of the mail, baggage and express cars, two of the passenger cars and one of the Pullmans, brought into Hillsboro by Nos. 9 and 209, are left there*of*. (S. F., pp. 3, 4, 5.) At Granger No. 9 is again broken up, and two of its mail, express and baggage cars, two of its passenger cars, and three of its Pullmans are from that point operated in one train over a branch line into Austin, and one of its passenger cars and one of its Pullmans are left at Granger to be carried thence by another train, to Houston. (S. F., pp. 3, 4, 5.)

The distance from Denison to San Antonio, via Dallas, plus the distance from Denison to Hillsboro via Ft. Worth, is 549 miles. (S. F., p. 36.) The schedule time for the trains between Denison and San Antonio, via Dallas, is thirteen hours (S. F., p. 36) and between Denison and Hillsboro is five hours and twenty minutes. (Tr., p. 11, S. F., p. 1.) The schedule time is therefore, thirty miles per hour. Passengers were let off and taken on at, from and between these points. (S. F., p. 42.)

These trains furnished sleeper accommodations for passengers between Texas points. (S. F., p. 42.)

The passenger trains of appellant, called local trains, carried sleepers between Fort Worth and Dallas and Kansas City and St. Louis. (S. F., p. 41.) These local trains carry the same equipment, except as to the Pullmans, as Nos. 9 and 209. (S. F., pp. 47, 54.)

Trains Nos. 5, 205, 6 and 206, the Flyers, are trains heavily patronized by intrastate passengers, and Mr. Crush, general passenger agent for appellant said these trains were just as much interstate trains as are Nos. 9 and 209. (S. F., p. 42.)

The appellant did not plead that the train was exclusively a "through interstate train" (Tr., p. 32) but alleged that it is operated primarily for the accommodation and benefit of interstate
210 passengers, "although passengers between points in Texas have been carried thereon when boarding the same at regular stops therefor with transportation to other regular stops." (Tr. p. 32.)

W. G. Crush, general passenger agent for appellant, testified: "We operate our trains for our passengers, first; the obligation is to the people along our lines." (S. F., p. 52.)

These trains carried passengers between all regular stops at intrastate points; at least twenty five per cent of the total traffic was intrastate. (S. F., p. 42.) The trains were publicly advertised to run through all local points at regular times. (S. F., pp. 1, 3.) The effect of the orders *are* to compel appellant to run its trains on time in Texas, and if necessary, to furnish extra trains to take care of its passengers reaching Denison from the north on belated trains. (Tr. pp. 34, 54.) "The first and greatest factor in handling passenger traffic is to have on-time trains." (S. F., p. 55).

"A railroad man looks upon delayed trains with the greatest

horror; delayed trains are the greatest nightmare that the passenger man has." (S. F., p. 55.)

The court found as a fact that trains Nos. 9 and 209 were inaugurated by appellant for the purpose of connecting at Denison, Texas with train No. 9 of the Missouri, Kansas & Texas Railway Company from Kansas City and St. Louis and that trains Nos. 9 and 209 carried both interstate and intrastate passengers. (Tr. pp. 53-54.)

The court found as a fact that the appellant could, at a reasonable expense, have operated its trains Nos. 9 and 209, south from Denison in two sections, so as to comply with its published schedule south of Denison and still have cared for the interstate passengers arriving at Denison on train No. 9 of the Missouri, Kansas & Texas Railway Company. (Tr. p. 54.)

Appellant's general passenger agent testified that the trains are operated for their passengers, first; that the obligation is to the people along the line, and if the way they operate the trains, it
211 connects with other trains, "well and good." (S. F., p. 52.)

These trains carry both interstate and intrastate passengers. (S. F., p. 42.) Of the interstate passengers carried by these trains in October, 1910, 2,888 either came to appellant off of other lines in Texas or were destined to points on other lines in Texas. (S. F., p. 67.) These trains between Denison and San Antonio cross thirty lines of railroad of other companies. (S. F., p. 33.) Mr. Crush also testified that: "The first and greatest factor in handling passenger traffic is to have on-time trains" * * * "a railroad man looks upon delayed trains with the greatest horror; delayed trains are the greatest nightmare that the passenger man has." (S. F., p. 55.)

The court found as a fact that appellant could, at a reasonable expense, have run its trains Nos. 9 and 209, in two sections south of Denison so as to comply with the published schedule and at the same time take care of the interstate passengers arriving at Denison on the Missouri, Kansas & Texas Railway Company's train No. 9. (Tr. p. 54.)

Authorities

Oviatt vs. Ry. Co., 43 Minn., 436: "A through freight train is a train which does not switch, and neither sets out, nor takes in, cars at interstate stations."

Ry. Co. vs. Illinois, 177 U. S., 514: "A through interstate train is one used exclusively for interstate traffic from and to points without the state of Illinois."

Ry. Co. vs. Ohio, 173 U. S., 285.

Ry. Co. vs. Ohio, 173 U. S., 285-301.

Gilman vs. Philadelphia, 3 "all., 713.

Panel vs. Turch, 95 U. S., 549.

Escanaba Co. vs. Chicago, 107 U. S. 678.

Cooley Const. Lim. (6th ed.) p. 715.

Upholding State speed regulation:

Crutcher vs. Kentucky, 141 U. S., 47.
Smith vs. Alabama, 124 U. S., 465.
Gladstone vs. Minnesota, 166 U. S., 427.
212 R. R. Com. Cases, 116 U. S., 307, 333.
Ry. Co. vs. Mayes, 201 U. S., 321.

Upholding state statutes regulating length and frequency of stops:

Ry. Co. vs. Mayes, 201 U. S., 321.
Gladstone vs. Minnesota, 166 U. S., 427.

Upholding state prohibition against running trains on Sunday:

Hennington vs. Georgia, 163 U. S., 299.
Ry. Co. vs. Ohio, 173 U. S., 285-301.
Gladstone vs. Minn., 166 U. S., 427.
Ry. Co. vs. Hughes, 171 U. S., 477.
Tel. Co. vs. Jones, 162 U. S., 650.
Mobile County vs. Kimball, 102 U. S., 691.
I. C. C. vs. Ry. Co. 145 U. S. 263.
Ry. Co. vs. I. C. C. 162 U. S., 197.
I. C. C. vs. Ry. Co., 167 U. S., 510.
U S. vs. Ry. Co., 65 Fed. 905.
Kinnavey vs. Terminal Co., 81 Fed., 803.
U. S. vs. Hanley, 71 Fed. 673.

12. The Court of Civil Appeals erred in holding that where a railroad company has provided ample facilities for the adequate accommodation of the traveling public such as may be proper and reasonable at any given point, and operate in addition thereto through trains for the accommodation of interstate passengers, an act of the State Legislature or Railroad Commission affecting the operation of said through trains is a burden upon and an interference with interstate commerce and is void.

Proposition No. 1.

Granting arguendo that the trains were instrumentalities of interstate commerce, nevertheless the orders of the Railroad Commission were applicable to the trains and valid, because the orders involved simply the exercise of the police power of the state in order to
213 meet the convenience and comfort of the traveling public, and did not constitute an unlawful interference with interstate commerce.

Proposition No. 2.

The regulation involved in this case when applied to the trains in question is simply a regulation or legislation upon the part of the state which works as an aid to commerce, and it is valid, although it might incidentally affect interstate commerce.

Proposition No. 3.

The particular field of regulation involved in this suit has not been occupied by congressional action, and in the absence of such occupation by Congress the state may enforce the regulation.

Proposition No. 4.

If it were true that Congress has occupied this field of regulation at all, nevertheless the Federal power has not been exercised to that extent and so directly and specifically as necessarily to supersede the state and oust its jurisdiction.

11. The Court of Civil Appeals erred in holding that "Since it clearly appears from the record that the trains involved in this contention were engaged in interstate commerce at the times in question, that the order of the Commission was not applicable to them."

Proposition No. 1.

Granting arguendo that the trains were instrumentalities of interstate commerce, nevertheless the orders of the Railroad Commission were applicable to the trains and valid, because the orders involved simply the exercise of the police power of the state in order to meet the convenience and comfort of the traveling public, and did not constitute an unlawful interference with interstate commerce.

Statement.

W. G. Crush, general passenger agent for appellant, testified: "We operate our trains for our passengers, first; the obligation is to the people along our lines." (S. F., p. 52.)

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The court found as a fact that trains Nos. 9 and 209 were inaugurated by appellant for the purpose of connecting at Denison, Texas, with train No. 9 of the Missouri, Kansas & Texas Railway Company from Kansas City and St. Louis and that trains Nos. 9 and 209 carried both interstate and intrastate passengers. (Tr. pp. 53-54.)

The court found as a fact that the appellant could, at a reasonable expense, have operated its trains Nos. 9 and 209 south from Denison in two sections, so as to comply with its published schedule south of Denison, and still have cared for the interstate passengers arriving at Denison on train No. 9 of the Missouri, Kansas & Texas Railway Company. (Tr. p. 54.)

Authorities.

Ry. Co. vs. Ohio, 173, U. S., 285-301.
Gilman vs. Philadelphia, 3 Wall., 713.
Pannel vs. Turch, 95 U. S., 459.
Escanaba Co. vs. Chicago, 107 U. S., 678.
Cooley: Const. Lim. (6th Ed.) p. 715.

Upholding State speed regulation:
Crutcher vs. Kentucky, 141 U. S., 47.
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Gladstone vs. Minnesota, 166 U. S., 427.
215 R. R. Com. Cases, 116 U. S., 307, 333.
Ry. Co. vs. Mayes, 201 U. S. 321.

Upholding state statutes regulating length and frequency of stops:
Ry. Co. vs. Mayes, 201 U. S., 321.
Gladstone vs. Minnesota, 166 U. S., 427.

Upholding State requirement that trains stop at stations:
Ry. Co. vs. Smith, 173 U. S., 684.

Upholding state prohibition against running trains on Sunday:
Hennington vs. Georgia, 163 U. S., 299.

Proposition No. 2.

The regulation involved in this case when applied to the trains in question is simply a regulation or legislation upon the part of the state which works as an aid to commerce, and it is valid, although it might incidentally affect interstate commerce.

Statement.

Appellant's general passenger agent testified that the trains are operated for their passengers, first; that the obligation is to the people along the line, and, if the way they operate the trains, it connects with other trains, "well and good." (S. F., p. 52.) These trains carry both interstate and intrastate passengers. (S. F., p. 42.) Of the interstate passengers carried by these trains in October, 1910, 2,888 either came to appellant off of other lines in Texas, or were destined to points on other lines in Texas. (S. F., p. 67.) These trains between Denison and San Antonio cross thirty lines

of railroad of other companies. (S. F., p. 33.) Mr. Crush also testified that: "The first and greatest factor in handling passenger traffic is to have on-time trains" * * * "a railroad man looks upon delayed trains with the greatest horror; delayed trains are the greatest nightmare that the passenger man has." (S. F., p. 55.)

The court found as a fact that appellant could, at a reasonable expense, have run its trains Nos. 9 and 209, in two sections south of Denison so as to comply with the published schedule and
216 at the same time take care of the interstate passengers arriving at Denison on the Missouri, Kansas & Texas Railway Company's train No. 9. (Tr. p. 54.)

Authorities.

Ry. Co. vs. Ohio, 173 U. S., 285-301.
Gladstone vs. Minnesota, 166 U. S., 427.
Lord vs. R. R., 5 C. C. R. 529.
Coast Line vs. N. C. Corp. Com., 206 U. S., 1.
Drinker: Inter. St. Com. Act, Vol. 1, pp. 61-64; also secs. 24, 767-269.
State vs. L. & N. 57 So., 175.
Ry. Co. vs. Hughes, 171 U. S., 477.
Tel. Co. vs. Jones, 162 U. S., 650.
Mobile County vs. Kimball, 102 U. S., 691.
I. C. C. vs. Ry. Co. 145 U. S., 263.
Ry. Co. vs. I. C. C., 162 U. S., 197.
I. C. C. vs. Ry. Co., 167 U. S., 510.
U. S. vs. Ry. Co. 65 Fed., 905.
Kinnavey vs. Terminal Co., 81 Fed. 803.
U. S. vs. Hanley, 71 Fed., 673.
Missouri Pac. Ry. Co. vs. Larabee Mills, 211 U. S., 612.

Proposition No. 3.

The particular field of regulation involved in this suit has not been occupied by congressional action, and in the absence of such occupation by Congress the state may enforce the regulation.

Authorities.

Drinker: Interstate Com. Act, vol. 1, pages 61-64. Also secs. 24, 767-269.
I. C. C. vs. Ry. Co., 145 U. S., 263.
Ry. Co. vs. I. C. C., 162 U. S., 197.
I. C. C. vs. Ry. Co., 167 U. S., 510.
U. S vs. Ry. Co., 65 Fed., 905.
Kinnavey vs. Terminal Co., 81 Fed. 803.
U. S. vs. Hanley, 71 Fed., 673.

217 Proposition No. 4.

If it were true that Congress has occupied this field of regulation at all, nevertheless the Federal power has not been exercised to that extent and so directly and specifically as necessarily to supersede the state and oust its jurisdiction.

Mo. Pac. Ry. Co. vs. Laradee Mills, 211 U. S., 612.

Appellee shows to the court that Messrs. Fiset & McClendon, who reside in Austin, Travis County, Texas, and Messrs. Alexander S. Coke and A. H. McKnight, who reside in Dallas, Dallas County, Texas, are the attorneys of record for appellant, the Missouri Kansas & Texas Railway Company of Texas herein.

Wherefore, appellee prays that it be granted a rehearing and that thereupon the judgment of this court reversing and rendering the judgment of the district court of Travis County and the cause be set aside, and that the judgment of said district court be affirmed.

B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Att'y General,
Attorneys for Appellee, the State of Texas.

(Endorsed:) No. 5159. Motion 4086. In the Court of Civil Appeals, 3rd Supreme Judicial District at Austin.—The M. K. & T. Ry. Co. of Tex., Appellant vs. The State of Texas, appellee, with app. No. 9049. Appellee's Motion for Rehearing. Granted,—Opinion by R. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Apr. 24, 1913. R. H. Connerly, Clerk. Filed in Supreme Court Aug. 25, 1914. F. T. Connerly, Clerk.

218 *Judgment of Court of Civil Appeals, Rendered May 13th, 1914, on Rehearing.*

Motion 4086; No. 5159.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS
vs.
THE STATE OF TEXAS.

Appeal from District Court of Travis County.

Opinion by Associate Justice Rice.

This day came on to be heard the motion of appellee, the State of Texas, for a rehearing, and the same being duly considered, because it is the opinion of the court that said motion ought to be sustained; it is therefore considered, adjudged and ordered that the motion be granted; that the former judgment of this court rendered on the 9th day of April, 1913, reversing and rendering the judg-

ment of the court below, be set aside and vacated, and that the judgment of the court below be in all things affirmed; that the appellee, The State of Texas, do have and recover of and from the appellant, Missouri, Kansas & Texas Railway Company of Texas, principal, and its surety, American Surety Company of New York, the amount adjudged by the court below and all costs in this behelf expended and this decision be certified below for observance.

Opinion of Court of Civil Appeals, on Rehearing.

Filed May 13th, 1914.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Opinion on Motion for Rehearing.

A very interesting, able and elaborate motion for rehearing, embracing all the questions involved in this appeal, supported and enriched by numerous authorities evincing great industry and research, has been filed by the Attorney General and his assist-
219 ant in behalf of the State, urging that the court erred in its original opinion reversing this case.

Among other reasons so assigned is that the court erred in holding that the order of the Commission discussed in the original opinion was void and not enforcible, because the trains in question originated in St. Louis and Kansas City, and not at Denison, Texas, and hence were instrumentalities of interstate commerce, and could not be regulated and controlled by the railroad commission of Texas. After a careful consideration of the matter, we are impressed with the correctness of appellee's contention. It is true that the original train No. 9 was made up of two separate and distinct trains, one operated out of St. Louis, and the other out of Kansas City, by the Missouri, Kansas & Texas Railway Company to Parsons, Kansas, where they were consolidated and run to Denison, Texas and delivered by said company to appellant; yet at this point the control and authority of the first company ceased, and, in a sense, the identity of the train was lost and the control of the latter company commenced, because here, parts of said train, with other equipment added were operated by appellant, with separate and distinct crews and engines, to Hillsboro, Texas—one as No. 9 via Dallas to said point, and the other as No. 209, via Ft. Worth, where some of the cars composing the train were dropped out. At Hillsboro they were reunited and operated to Granger as No. 9, where they were again divided and thereafter operated by appellant as separate and distinct trains, one part thereof going to Houston, and the other to San Antonio, via Austin. They were advertised and known as appellant's

trains, and were scheduled by it each to leave Denison daily at 6:25 a. m. For which reasons, we think, so far as appellant is concerned, said trains Nos. 9 and 209 must be regarded as originating at Denison, Texas. Besides this, under the Constitution and laws of this state, Denison must be regarded as the beginning or starting point of said trains. Appellant had no right to operate its trains beyond the state line; and therefore, trains received at the line and operated by it through the state must be regarded as commencing at such point. See Railway Commission vs. C. R. I. & G. Ry. Co. 102 Tex. 397. Section 1, Art. 10 of the Constitution of this State
220 provides that "Any Railroad Corporation or association, organized under the law for the purpose, shall have the right to construct and operate a railroad between any points within this state, and to connect at the state line with railroad- of other states." The statutes under which appellant is incorporated only authorized it to operate between named points within this state. See R. S. 1911, art. 6408. In Railroad Commission vs. C. R. I. & G. Ry. Co. supra, it is said: "The State line is in law and in fact the terminus of a railroad intersecting it constructed by a Texas corporation, because its powers cease at that line."

It is true, as contended by appellant, that such trains were operated under a contract between it and the Missouri, Kansas & Texas Railway Company, whereby it was required to receive original train No. 9 from said last named company at the State line, and operate it over its lines of railway to San Antonio, its point of destination in Texas, in consideration that the Missouri, Kansas & Texas Railway Company would likewise receive from appellant trains Nos. 10 and 210 at such point and operate them over its respective lines to a named destination beyond the State; by reason of which it is, in effect, contended by appellant that notwithstanding the fact that it was operated as two distinct trains, known as No. 9 and No. 209, south from Denison, it should be regarded as originating in Kansas City and St. Louis, instead of at Denison, and thence operated jointly by said two companies as a through train to its point of destination, constituting it a through train, and thereby relieving it from the control of the Railroad Commission. Even though it was being operated under and by virtue of said contract, still we are not disposed to think that this would have the effect to change the initial or beginning point, so far as appellant is concerned, to a point outside the State of Texas; especially in view of the fact that the law, as we have seen, does not permit appellant to extend its lines beyond the state, but confines its operations to points within the same.

221 We therefore hold that such train must be regarded as having originated at Denison, Texas, where appellant took charge of it, operating it as separate and distinct trains from said point to destination over its lines in accordance with its contract. This view renders it unnecessary for us to consider and pass upon the many other interesting questions presented in the briefs of the respective parties relating to the right of appellant to operate said trains under the Interstate Commerce law, independant of state

control; because this being an intrastate transaction, as we have held it is, appellant in the operation and management of its trains must be held subject to the control of the Railroad Commission. Notwithstanding the order was passed in 1907, and the violations are charged to have occurred in 1908, yet we think it is not necessary, as appellant contends that it should first have been cited by the commission to show cause why it had failed to comply therewith before suit could be instituted to enforce such order. It was a general order, applying to all roads of the state falling within its purview, and hence could be enforced by the courts in the first instance.

Nor do we think that there is any merit in appellant's further contention to the effect that the court erred in assessing the penalty for more than one violation. This was not a continuous offence. Each violation is by the statute made an offence, and punishable as such; hence the trial court did not err in overruling appellant's contention in this respect. See Baltimore & Ohio S. W. R. R. Co. vs. United States, 220 U. S., 94; and also State vs. Wisconsin Central Ry. Co. 113 N. W., 952.

In the first case referred to it was held that where there were different shipments of cattle under the 28 hour law, which required that they should not be carried for a longer period than 28 hours without being unloaded for feed and water, that a separate punishment might be imposed for each shipment. If however, a number of shipments were made at the same time and place, therefore requiring unloading and watering at the same time to comply with this law, then and in that event, but one punishment could be imposed.

222 In the last case cited, where the law limited the speed of trains in cities and villages and imposed a penalty "for each and every" violation, it was held that this would authorize a recovery of cumulative penalties in one action where several violations are shown.

The statute in the present case imposes a penalty for every act of violation thereof, see art. 6672, R. S. 1911. Hence the court was within the law in imposing a penalty for each violation as shown by the evidence.

Believing that we erred for the reasons indicated, in reversing and rendering the case, the motion for rehearing is granted and the order of reversal heretofore made is set aside, and the judgment of the court below is in all respects affirmed.

Motion granted and judgment affirmed.

B. H. RICE,
Associate Justice.

Filed May 13, 1914.

(Endorsed:) Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, May 13, 1914. R. H. Connerly, Clerk.

223 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appellant's Motion for Rehearing.

Now comes the Missouri, Kansas & Texas Railway Company of Texas, appellant in the above entitled and numbered cause, and moves the court to grant it a rehearing and upon rehearing to set aside the court's judgment and order made and entered herein May 13, 1914, and to reverse the judgment of the court and here render judgment in its favor, as in the original opinion and decree, for the following reasons:

I.

The court erred in holding that original train No. 9 was delivered by Missouri, Kansas & Texas Railway Company to appellant at Denison, Texas, and that at such point the control and authority of the first named Company ended and that of appellant began.

Argument.

This finding of the court is directly contrary to the facts, about which there is no dispute in the record. Section 5 of the agreed statement of facts recites:

"5. That the railroad of defendant connects with the railroad of Missouri, Kansas & Texas Railway Company at the Texas-
224 Oklahoma State line, about five miles North of Denison, Grayson County, Texas, which point of connection, for convenience, will hereafter be called Red River. That by an agreement between defendant and said Missouri, Kansas & Texas Railway Company certain trains, among others the train called by them No. 9, *are* operated from the North to Denison are interchanged between the two at Red River, but there is no change in either crew or equipment at Red River, the trains between Red River and Denison consisting of the same equipment and being operated by the same crews of which they consist and by which they are operated upon the railroad of Missouri, Kansas & Texas Railway Company to Red River; that said train No. 9, operated over the lines of both companies, which, for convenience, will hereafter be called No. 9, from the North, originates in two sections, one at St. Louis and the other at Kansas City, and both of said sections are run over the tracks of the Missouri, Kansas & Texas Railway Company to Parsons, Kansas, where they are consolidated into one train,

which runs South over its tracks to Red River, from which point to Denison it is operated over the tracks of the defendant. While said train and the crew operating the same are in Oklahoma they are under the jurisdiction and control of the Missouri, Kansas & Texas Railway Company, and while in Texas they are under the jurisdiction and control of the defendant." (Statement of Facts, p. 3.)

There can be no difference of opinion about what these facts show. It appears from them that the point of connection between the lines of the two companies is the boundary line between the State of Texas and the State of Oklahoma, about five miles North of Denison, and that from this line South appellant has jurisdiction and control of the train.

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II.

The court erred in holding that Denison is the beginning or starting point of trains Nos. 9 and 209 and that, because of this, said trains are intrastate trains and appellant, in the operation and management thereof, is subject to the control of the Railroad Commission of Texas.

Argument.

In its first opinion the court held that a through passenger train operated between points in different states is an instrumentality and facility of interstate commerce, within the meaning of the Act to Regulate Commerce, and that the jurisdiction to regulate and control such train lies with the Interstate Commerce Commission. It also held that about seventy per cent. of the passenger traffic handled on trains Nos. 9 and 209 is interstate. We do not understand that the second opinion questions these holdings. The point on which the court has changed its mind is not that an interstate train would be subject to regulation and control by the Interstate Commerce Commission, but that the trains involved in this case are interstate trains. They are, so the court holds, intrastate trains, and this by virtue of the fact that appellant operates them only between points in the State of Texas.

We respectfully submit that this last holding is not supported by either reason or authority.

Suppose a single company operated these trains, just as they are operated by appellant and Missouri, Kansas & Texas Railway Company. Would the court, in that event, hold that the movement of the trains in Texas is purely intrastate? Clearly not. The fact that two companies operate them instead of one can make no difference. The character of the trains as state or interstate is fixed, not by the number of companies operating them or by the ownership of the rails over which they pass, but by the facts of their operation. Whether they be operated by one company
226 or by two or more, when they start from a point in one state to a point in another state for the purpose of handling inter-

state traffic that fixes their character as interstate trains, which remains with them till their final destination is reached.

Original train No. 9, or train No. 9 from the North, as it is called in the record for clearness of expression, crosses the State line without a stop and without a change of equipment or crews. Is there any magic in the state line to change the character of the train while passing over it under these circumstances? The train is divided at Denison, its equipment being shifted and additional equipment added that one section may be run by way of Dallas and another by way of Fort Worth. Engines and crews are changed at Denison also, but that is because Denison is a division point and not because a new company takes charge of the train. When the equipment moves South from that point it is still run primarily for the accommodation of interstate traffic, and the principal part of its traffic is of that class. Why should it not still be an interstate train?

An Act of Congress fixes the number of hours the dispatchers, telegraph operators and crews operating the train may labor from the time the train leaves St. Louis and Kansas City till it arrives at San Antonio and Galveston. Northern Pacific Ry. Co. vs. Washington, 223 U. S. 370, and State vs. Texas & New Orleans R. R. Co., 124 S. W. 984. Another Act of Congress fixes the liability for injuries to the crews operating the train throughout the entire journey. Second Employers' Liability cases, 223 U. S. 1. Still another Act of Congress prescribes the safety appliances with which the train must be equipped. Southern Ry. Co. vs. United States, 222 U. S. 20. These proportions cannot be doubted. How, in the face of them, can it be said that the train itself is intrastate from the moment it crosses the state line?

227 That the train is interstate all the way is well supported by authority, as reference to a few cases will show.

In Kansas City Southern Railway Co. vs. Cook (Arkansas), 140 S. W. 579, the question was whether, when the plaintiff alleged that *the* was brakeman on a local freight train out of Texarkana, Texas, into Little River County, Arkansas, without averring that the train carried any commerce, he alleged his employment in interstate commerce so as to bring the cause of action for his injuries under the Federal Employers' Liability Act. In disposing of the case the court said:

"The allegation is plainly to the effect that the freight train which plaintiff assisted in operating was one running from the state of Texas into the State of Arkansas. This constituted interstate commerce, even though it was described as a local freight train, and without a specific allegation that it was then carrying consignments across the state line. If the trains as run from one state into another for the purpose of carrying freight from station to station, it was engaged in interstate commerce, even though it does not appear that any freight was actually carried across the state line, for it is the operation of the train for the purpose of carrying freight across the state line, if offered, which constituted interstate commerce. Now was it necessary for the complaint to contain a statement that the par-

ticular defective car which caused the injury was one used in intersate traffic. If it constituted a part of the train at the time plaintiff was injured, and he was then engaged in discharging his duties in operating a train engaged in interstate commerce, it is sufficient. We are of the opinion, therefore, that the allegations of the complaint necessarily brought the case within the terms of the Federal statute."

The following is from the Syllabus of United States vs. Chicago Great Western Ry. Co., 162 Fed. 776.

228 "A freight train scheduled to run regularly between points in different states is a single train throughout such run and at all times subject to the provisions of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 835), although some of the cars composing it may have been left and others taken on at different stations, and although after entering the second state the engine, caboose, and train crew may have been changed. In such case, if at any one or more points in the run a sufficient number of the cars composing the train are not equipped with air brakes to meet the requirement of the Act, the railroad company is liable to the penalty imposed for its violation, but to one penalty only."

In Johnson vs. Southern Pacific Co., 196 U. S. 1, the Supreme Court held that a dining car stocked and standing at a station to be made a part of an interstate train was a facility or instrument of interstate commerce and subject to the provisions of the Safety Appliance Acts of Congress.

In Galveston, Harrisburg & San Antonio Ry. Co. vs. Wood, Hagenbarth Cattle Co., 105 Tex., 178, our State Supreme Court held that a shipment of cattle moving over the line of the G., H. & S. A. from Valentine, Texas, to El Paso, on a local bill of lading, and thence over the line of the El Paso & Southwestern on another bill of lading to Columbus, New Mexico, it having been intended when the cattle were shipped from Valentine that they should go to Columbus, was interstate and that the Federal Law and not the State Law controlled.

In Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 219 U. S., 498, which involved shipments of cottonseed from points in Texas to Galveston, where they were converted into oil and cake and thence, in the modified form, shipped to foreign points, the Supreme Court quoted with approval the statement in Coe vs. Errol, 116 U. S., 517, that goods are in interstate or

229 foreign commerce when they have "actually started in the course of transportation to another state or delivered to a carrier for transportation."

What is said of goods would, of course, apply as well to passengers and the equipment in which they are handled.

The following cases are in effect the same as that last cited: Railroad Commission of Ohio vs. Worthington, 225 U. S. 101; Texas & New Orleans R. R. Co. vs. Sabine Tram Co., 227 U. S. 111, and Railroad Commission of Louisiana vs. Texas & Pacific Railway Co., 229 U. S. 336.

In the last case the court, speaking of the commerce involved, said, "And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country."

In North Carolina R. R. Co. vs. Zachary, Vol. 34, Supreme Court Reporter, 305, the Supreme Court of the United States was called upon to determine whether a fireman was employed in interstate commerce. He reported for duty at Selma, North Carolina, to run a train to Spencer, in the same state. The train his engine was to pull contained a car that had been brought into Selma from a point in the State of Virginia. Before his train left Selma, but after he had reported for duty, a shifting or switch engine struck and killed him. It was held that he was employed in interstate commerce at the time of his death and that the defendant's liability was controlled by the Federal Law.

It is the character of the train in connection with which an employe works that determines whether he is employed in interstate commerce and not the character of the train that causes his injury. Pederson vs. Delaware, Lackawanna & Western R. R. Co. 229 U. S., 146.

The principal reason given by the court for its holding is that appellant had no right to operate its trains beyond the state line, and in support of this Section 1, Article 10 of the Constitu-
230 tion and Railroad Commission vs. C. R. I. & G. Ry. Co., 102 Tex., 397, are cited.

But clearly the authorities upon which the court relies do not support its conclusion. The question involved in the Rock Island case was the validity of an order of the Texas Commission directing the Railway Company to construct a station at the State line. The Supreme Court held that a state line was a terminus to the company's road but did not undertake to pass upon the question whether the commerce handled by the Rock Island and its connection over the State line or from the State line to points in Texas was state commerce or interstate commerce. Whether the Company could operate trains in Oklahoma was not before the court.

Nor is there anything in the provision of the Constitution cited making it unlawful for appellant to operate trains in Oklahoma. This provision is permissive and not prohibitory. In other words, it confers, and does not limit, power. There is nothing in it or in any other provision of the Constitution which says that a Texas railroad Company shall not operate trains in another state. And it is well known that the line of the Gulf, Colorado & Santa Fe Railway Company, a Texas corporation, extends northward to Purcell, Oklahoma. It is also well known that this appellant operates trains from the Texas State line to Shreveport, Louisiana, a distance of about twenty miles, which it does by virtue of authority conferred upon it by an Act of the Legislature of Texas, approved May 16, 1899 (Chapter 120, page 206, General Laws Twenty-sixth Legislature), entitled: "An Act to authorize the Missouri, Kansas & Texas Railway Company of Texas to acquire, by purchase or lease, the railroad of The Sherman, Shreveport & Southern Railway Company, extending from

the city of McKinney, in Collin county, to the City of Jefferson, in Marion County, and any extension thereof from said city of Jefferson to the eastern line of Texas, in the direction of Shreve-
231 port, Louisiana, together with the property and franchise pertaining thereto, and to own, operate and maintain the same as a part of its line, with the right to extend the same, and construct branches therefrom, by amendment of its charter, under the General Laws of the State of Texas, and investing said companies, and each of them, with the power to make and execute all necessary contracts, agreements and conveyances to effect such sale or lease; also to authorize the said The Sherman, Shreveport & Southern Railway Company, before such sale or lease, or the said the Missouri, Kansas & Texas Railway Company of Texas, after such sale or lease, when the said railway, so to be purchased or leased, has been extended from the city of Jefferson to the eastern line of the State of Texas, in the direction of Shreveport, Louisiana, to connect with any railway extending to said City of Shreveport, and to acquire from the owner or owners of such line of railway in the State of Louisiana, by lease, trackage or running rights agreement, the use of such line to the said city of Shreveport; and further, to authorize the said The Sherman, Shreveport & Southern Railway Company, before such sale or lease, or the said The Missouri, Kansas & Texas Railway Company of Texas, after such sale or lease, to acquire necessary terminal facilities in the said city of Shreveport."

As we view the matter, whether appellant is authorized to operate a railroad in Oklahoma or not *it* wholly immaterial. That fact can have no bearing whatever on the character of the trains operated by it. But for the reasons stated there is no basis in law for the fact even if it were material.

III.

The court erred in holding that, in any event, appellant would be subject to a penalty for a violation of the order of the Railroad Commission without a hearing before the Commission to show cause why it had failed to comply therewith.

232 IV.

The court erred in holding that, if appellant be subject to any penalty, more than one penalty can be recovered.

V.

The court erred in overruling appellant's first assignment of error, page 23 of its brief, for the reasons stated in the propositions thereunder, the statement supporting the same and the authorities cited in support thereof.

VI.

The court erred in overruling appellant's second assignment of error, page 23 of its brief, for the reasons stated in the propositions

thereunder, the statement supporting the same and the authorities cited in support thereof.

VII.

The court erred in overruling appellant's third assignment of error, page 25 of its brief, for the reasons stated in its proposition thereunder and the statement supporting the same.

VIII.

The court erred in overruling appellant's fourth, fifth and sixth assignments, submitted together, pages 26 and 27 of its brief, for the reasons stated in the propositions thereunder and the statement supporting the same.

IX.

The court erred in overruling appellant's seventh, eighth and ninth assignments, submitted together, page 28 of its brief, for the reasons stated in the propositions thereunder and the statement supporting the same.

X.

The court erred in overruling appellant's tenth and eleventh assignments of error, submitted together, pages 30 and 31 of its brief, for the reasons stated in the proposition thereunder and the statement supporting the same.

233 XI.

The court erred in overruling appellant's twelfth assignment of error, pages 32 and 33 of its brief, for the reasons evidenced by the assignment itself, which was submitted as a proposition, and the statement supporting the same.

XII.

The court erred in overruling appellant's thirteenth assignment of error, page 33 of its brief, for the reasons stated in the assignment itself, which was submitted as a proposition, and the statement supporting the same.

XIII.

The court erred in overruling appellant's fourteenth assignment of error, page 34 of its brief, for the reasons stated in the assignment itself, which was submitted as a proposition, and the statement supporting the same.

XIV.

The court erred in overruling appellant's fifteenth, sixteenth, seventeenth, eighteenth and nineteenth assignments of error, submitted

together, pages 34 to 37 of its brief, for the reasons stated in the propositions thereunder, the statements supporting the same and the authorities cited in support thereof.

XV.

The court erred in overruling appellant's twentieth assignment of error, page 41 of its brief, for the reasons stated in the assignment itself, which was submitted as a proposition and the statement supporting the same.

XVI.

The court erred in overruling appellant's twenty-first assignment of error, pages 42 and 43 of its brief, for the reasons stated in the assignment itself, which was submitted as a proposition, and the statement supporting the same.

234 XVII.

The court erred in overruling appellant's twenty-second, twenty-third and twenty-fourth assignments of error, submitted together, pages 43 and 44 of its brief, for the reasons stated in the propositions thereunder and the statements supporting the same.

XVIII.

The court erred in overruling appellant's twenty-fifth assignment of error, pages 47 and 48 of its brief, for the reasons stated in the assignment itself, which was submitted as a proposition, and the statement supporting the same.

XIX.

The court erred in overruling appellant's twenty-sixth assignment of error, page 50 of its brief, for the reasons stated in the assignment itself, which was submitted as a proposition, and the statement supporting the twenty-fifth assignment of error.

XX.

The court erred in overruling appellant's twenty-seventh, twenty-eighth, twenty-ninth and thirtieth assignments of error, submitted together, pages 51 to 56, inclusive, of its brief, for the reasons stated in the propositions thereunder, the statements supporting the same, and the authorities cited in support thereof.

XXI.

The court erred in overruling appellant's thirty-first and thirty-second assignments, submitted together, pages 58 to 61, inclusive, of its brief, for the reasons stated in the proposition thereunder, the

statement supporting the same and the authorities cited in support thereof.

XXII.

The court erred in overruling appellant's thirty-third assignment of error, page 62 of its brief, for the reasons stated in its proposition thereunder, the statement supporting the same and the au-
235 thority cited in support thereof.

XXIII.

The court erred in overruling appellant's thirty-fourth assignment of error, pages 63 and 64 of its brief, for the reasons stated in the assignment itself, which was submitted as a proposition, the statement supporting the same and the authority cited in support thereof.

XXIV.

The court erred in overruling appellant's thirty-fifth assignment of error, pages 64 and 65 of its brief, for the reasons stated in the proposition thereunder and the statement supporting the same.

XXV.

The court erred in overruling appellant's thirty-sixth, thirty-seventh and thirty-eighth assignments of error, submitted together, pages 66 to 70, inclusive, of its brief, for the reasons stated in the proposition thereunder, the statement supporting the same and the authority cited in support thereof.

XXVI.

The court erred in overruling appellant's thirty-ninth assignment of error, page 71 of its brief, for the reasons stated in the assignment itself, which was submitted as a proposition, and the preliminary statement, pages 11, 12 and 13 of its brief.

XXVII.

The court erred in overruling appellant's fortieth, forty-first and forty-second assignments of error, submitted together, pages 72 and 73 of its brief, for the reasons stated in the proposition thereunder, the statement supporting the same and the authorities cited in support thereof.

236 XXVIII.

The court erred in setting aside its original opinion and judgment herein rendered April 11, 1913, for the reasons therein stated.

Appellant respectfully represents that Honorable B. F. Looney,

Attorney General of the State of Texas, and Honorable Luther Nickels, Assistant Attorney General, both of whom reside in the city of Austin, Travis county Texas, are attorneys of record for appellee.

Wherefore, appellant prays that this motion be in all things granted.

Respectfully submitted,
CHAS. C. HUFF,
FISET, McCLENDON & SHELLEY,
A. H. McKNIGHT,
Attorneys for Appellant, The Missouri, Kansas & Texas Railway Company of Texas.

(Endorsed:) Mo. 4327, Missouri, Kansas & Texas Railway Company of Texas vs. The State of Texas. No. 5159. Appeal from Travis county. Motion for Rehearing. Overruled. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, May 25th, 1914. R. H. Connerly, Clerk. With App. No. 9049. Filed in Supreme Court Aug. 25, 1914. F. T. Connerly, Clerk.

Order Made June 10th, 1914, by Court of Civil Appeals Overruling Above Motion for Rehearing.

Motion 4327. 5159.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS
vs.
STATE OF TEXAS.

Appeal from Travis County.

Motion for a Rehearing.

The motion is overruled.

237 In the Supreme Court of Texas.

No. —.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS,
Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Appeal from the District Court of Travis County.

Petition for Writ of Error to the Third Court of Civil Appeals.

To the Supreme Court of Texas:

Your petitioner, the Missouri, Kansas & Texas Railway Company of Texas, respectfully represents:

1.

That this suit was instituted by the State to recover penalties from petitioner in the sum of $400,000.00 under Article 6672, Revised Civil Statutes of 1911, for eighty alleged violations of Passenger Circular No. 18, issued by the Railroad Commission of Texas, February 23, 1907, which relates to the running of passenger trains on schedule time and is commonly called the Thirty Minute Order; and a trial before the court resulted in a judgment against petitioner for $14,000.00. This judgment was reversed and judgment was
238 rendered for petitioner by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, April 11, 1913. The State in due time filed its motion for a rehearing, which motion was, on May 13, 1914, granted, and the judgment of the trial court was affirmed. Thereafter, within fifteen days, petitioner filed its motion for a rehearing in said Court of Civil Appeals, which was overruled June 10, 1914. Petitioner, therefore, now applies to this Honorable Court, to the end that the errors committed by the Court of Civil Appeals and hereinafter set out may be corrected.

Preliminary Statement.

The record shows without controversy that Passenger Circular No. 18 was regularly promulgated by the Railroad Commission of Texas, and, if valid, was in force from September 8, 1910, to November 8, 1910. The material part of this circular is Rule 2, which reads as follows:

"Each and every railroad company operating a railroad in this state shall start its passenger trains from the points of origin in accordance with advertised schedule, and said trains, except from unavoidable accidents thereto en route, shall observe and conform to the published schedule as to arrival and departure at the several stations on the line; provided, that trains may be held not to exceed thirty (30) minutes at origin or at junction points with other lines to make connection with trains on such other lines. If, at the expiration of said thirty minutes, connecting trains are in sight, ten minutes, in addition to said thirty minutes, will be allowed in which to make the connection. Where connecting trains arrive within the time above allowed a reasonable time, in addition to that above provided for, will be allowed for transfer of passengers, mail, express and baggage. Where connections are reliably reported to be more than thirty minutes late, no wait will be made." (Tr. p. 4.)

239 This circular is based upon Article 6552, Revised Civil Statutes of 1911, reading:

"Every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and at junctions of other roads and at sidings

and stopping places established for receiving and discharging way passengers and freights, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of railroad companies to comply with the requirements of this article shall be deemed an abuse of their rights and privileges and subject to regulation and correction by the Railroad Commission."

Article 6552 was first enacted in 1853, and it remained in its original form until 1903, when the concluding sentence, declaring a failure to comply with the requirements of the Article an abuse and giving the Railroad Commission authority to correct the same, was added.

The State asserts the right to recover the penalties claimed under Article 6672, Revised Civil Statutes of 1911, which reads:

"If any railway company doing business in this State shall hereafter violate any other provision of this chapter, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not been provided by law, or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Railroad Commission of Texas, for every such act of violation it shall pay to the State of Texas a penalty of not more than five thousand dollars."

240 The trains involved in the case are referred to as Nos. 9 and 209. No. 9 operates between Denison and San Antonio via Dallas and No. 209 between Denison and Hillsboro via Fort Worth. The facts concerning the formation, operation and character of these trains are sufficiently shown by paragraph 5 of an agreed statement of facts entered into for the purpose of the trial, which reads:

"5. That the railroad of defendant connects with the railroad of Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma State line, about five miles North of Denison, Grayson County, Texas, which point of connection, will hereafter be called Red River. That by an agreement between defendant and said Missouri, Kansas & Texas Railway Company certain trains, among others the train called by them No. 9, are operated from the North to Denison and are interchanged between the two at Red River, but there is no change in either crew or equipment at Red River, the trains between Red River and Denison consisting of the same equipment, and being operated by the same crews of which they consist and by which they are operated upon the railroad of Missouri, Kansas & Texas Railway Company to Red River; that said Train No. 9, operated over the line of both Companies, which, for convenience, will hereinafter be called No. 9, from the North, originates in two sections, one at St. Louis and the other at Kansas City, and both of said sections are run over the tracks of the Missouri, Kansas & Texas Railway Company to Parsons, Kansas, where they are consolidated into one train, which runs South over its tracks to Red River, from which point to Denison it is operated over the tracks of the defendant.

241 While said train and the crew operating the same are in Oklahoma they are under the jurisdiction and control of the

Missouri, Kansas & Texas Railway Company, and while in Texas they are under the jurisdiction and control of the defendant.

"That Train No. 9 from the North was usually composed of about ten cars, some of which, when the train reached Denison, were placed in defendant's Train No. 9 and carried South via Dallas to Hillsboro, the remainder being placed in defendant's Train No. 209 at Denison and run South via Fort Worth to Hillsboro, at which last named place the cars so operated via Dallas and via Fort Worth were again combined into a single train, which was operated over defendant's line to and through the City of Austin. Defendant's train No. 209 usually carried about three of the cars contained in No. 9 from the North, and the remainder of the cars in No. 9 from the North were usually placed in defendant's Train No. 9. Other cars were picked up at Denison and made a part of defendant's Trains Nos. 9 and 209 from time to time as necessary. Two of the sleepers contained in No. 9 from the North were usually operated via Fort Worth and the remaining three via Dallas. Train No. 209 usually carried about six cars from Denison to Hillsboro, a distance of 151 miles, and Train No. 9 usually carried about seven cars from Denison to Hillsboro, a distance of 172 miles, one or two of which, however, were generally set out at Dallas. From Hillsboro to Granger, a distance of 95 miles, defendant's Train No. 9 usually consisted of 9 cars, and from Granger to Austin, a distance of 47 miles, of 7 cars. The cars set out at Granger were carried to Houston and returned, being picked up at Granger again on North-bound trips. The equipment of No. 9 from the North usually consisted of two mail, baggage and express cars, three passenger coaches and five sleepers; of defendant's Train No. 209 of two mail, baggage and express cars, two passenger
242 coaches and two sleepers; of defendant's train No. 9 between Denison and Hillsboro of two mail, baggage and express cars, two passenger coaches and three sleepers, and of Train No. 9 from Hillsboro to Granger of two mail, baggage and express cars, three passenger coaches, and four sleepers. From Granger to and through Austin the equipment of No. 9 consisted of two mail, baggage and express cars, two passenger coaches and three sleepers.

"That the crews of No. 9 from the North did not come South of Denison, new crews being secured there for defendant's Trains Nos. 9 and 209, and new engines were secured at Denison for said trains. All of the facts set out in this subdivision of the agreement were true from September 8 to November 8, 1910" (S. of F., p. 3).

The trial court found that petitioner violated Passenger Circular No. 18 on Twenty-eight different occasions and assessed a penalty of $500 for each alleged violation. Fourteen of these alleged violations involve Train No. 9 and fourteen Train No. 209. All of them except one are based upon the failure of petitioner to start Trains Nos. 9 and 209 out of Denison in accordance with the terms of the circular. The remaining penalty was imposed because Train No. 9 was held at Hillsboro more than thirty minutes to await the arrival of No. 209.

It is admitted that Train No. 9 was held at Hillsboro more than the prescribed time and that Nos. 9 and 209 left Denison, one on thirteen different occasions and the other on fourteen different oc-

casions, more than thirty minutes after their schedule time for departure, when Train No. 9 from the North was not in sight. It is also agreed that an unavoidable accident delayed No. 209 on the date that No. 9 was held for it at Hillsboro and that in each case the failure of Nos. 9 and 209 to leave Denison as scheduled was due to the fact that No. 9 from the North was late and was delivered to petitioner at Red River at such time as to make it impossible for
243 regular Nos. 9 and 209 to leave on schedule time.

Trains No. 9 from the North, No. 9 and No. 209, are popularly called the Katy Limited, and, with their corresponding North bound trains, run daily between St. Louis and Kansas City, Missouri, and San Antonio, Texas. They were put on primarily to handle interstate passengers, and about seventy per cent. of their traffic is interstate. They are operated under a contract between petitioner and Missouri, Kansas & Texas Railway Company, concerning which W. G. Crush, petitioner's General Passenger and Ticket Agent, testified:

"The Texas Company is under contract to receive this Train No. 9 from the other company at the State line; we have a contract with them agreeing to run the train through whenever delivered. It is manifest that we cannot take the train until we get it. If we were to run this special train from Red River or from Denison, when the "Limited" comes in we would still have to run it; the obligation would be to run it through. With regard to holding the 'Limited' over to make connection with some other train, that would put us out of business; it would destroy the usefulness of the train for this through competitive interstate business for which the train was put on. We could not hold interstate passengers there until some subsequent train was due to go out" (S. of F. p. 55).

The Court of Civil Appeals first held that the trains involved are interstate and that the power to regulate interstate trains is vested in the Interstate Commerce Commission and not in the Railroad Commission of Texas. It also held that petitioner has adequate train service to accommodate its local passenger traffic outside Trains Nos. 9 and 209. On rehearing, it reversed its holding that the trains involved are interstate, but permitted the other rulings to stand. It is out of these holdings, applied to the facts stated, that the questions presented in this petition grow.

244 Grounds of Jurisdiction.

(1) The Supreme Court has jurisdiction because the Railroad Commission is a party to the suit.

This statement involves a construction of Subdivision 5, Article 1521, Revised Civil Statutes of Texas, as amended by Chapter 55 of the General Laws of the Thirty-third Legislature. The Railroad Commission is not nominally a party, but the suit is based upon one of its orders and was instituted at its direction. Petitioner says, therefore, that the Commission is a party within the spirit and meaning of the Act.

(2) The Supreme Court also has jurisdiction because the Court

of Civil Appeals, in disposing of the case, erroneously declared the substantive law of the case in rulings upon questions of law substantially affecting the right of petitioner to maintain its defense, in the following respects:

(*a*) The Court of Civil Appeals held, in effect, that Passenger Circular No. 18, which is a substantial re-statement of Article 6552, Revised Civil Statutes of 1911 and nothing more, is a lawful requirement, order, judgment or decree made by the Railroad Commission of Texas, whereas, the truth is that Article 6552 does not confer upon the Railroad Commission power to define abuses, which the circular undertakes to do, but itself defines the abuses which may be corrected by the Commission, and the method of correcting an abuse thereunder is for the Commission to call a hearing with respect to a particular matter and make its requirement, order, judgment or decree based upon the facts adduced at such hearing, which admittedly was not done in this case, the order claimed to have been violated having been promulgated long before Trains Nos. 9 and 209 were inaugurated. Had the court held, as petitioner contends it shou-d, that Passenger Circular No. 18 is ineffective or inoperative because it undertakes to define an abuse, which the statute
245 upon which it is based does not authorize, and is not a requirement, order, judgment or decree respecting a state of facts, which the statute does authorize, this, of necessity, would have caused the rendition of judgment in petitioner's favor.

(*b*) The Court of Civil Appeals held that Article 6552, Revised Civil Statutes, and Passenger Circular No. 18, apply to petitioner's Trains Nos. 9 and 209, which the uncontradicted evidence shows are but sections or parts of a through train operated under contract by petitioner and Missouri, Kansas & Texas Railroad Company primarily for the handling of interstate traffic between points in Texas and points in the State of Missouri and points beyond, whereas, neither said statute nor said circular was intended to or does apply to any except local trains handled under the exclusive control of a single carrier wholly between points in the State of Texas; and had the Court of Civil Appeals so held, it would have been necessary to render judgment for petitioner.

(*c*) The Court of Civil Appeals on the State's motion for rehearing, held that petitioner's Trains Nos. 9 and 209 are local trains originating at Denison, Texas, and, as such, are subject to the jurisdiction of and to control by the Railroad Commission of Texas; whereas, according to the undisputed evidence, as set forth in Subdivision 5 of the agreed stipulation copied on pages 4-7 of this petition, said trains are through trains, originating in the State of Missouri, and received by petitioner at Red River, about five miles North of Denison, and as a matter of law, they, as such, are not subject to regulation by the Railroad Commission of Texas in
246 the matters covered by Passenger Circular No. 18, but are subject to the jurisdiction of the Interstate Commerce Commission, and, had the Court of Civil Appeals so held, petitioner would have been entitled to judgment. In other words, Passenger Circular No. 18, as applied to petitioner's Trains Nos. 9 and 209,

is a burden upon, a regulation of and an interference with, interstate commerce, contrary to Subdivision 3, Section 8, Article 1 of the Constitution of the United States, and in conflict with the Act to Regulate Commerce approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, passed by Congress thereunder, as the undisputed facts show, whereas, the Court of Civil Appeals held to the contrary, and thus denied to petitioner the benefit of its defense based upon the commerce clause of the Federal Constitution and the Act to Regulate Commerce.

(*d*) The Court of Civil Appeals on the State's motion for rehearing held that petitioner has no right to operate trains outside the state of Texas when there is nothing in the Constitution or laws of the State prohibiting it from doing so, and, as a matter of fact, it does daily, under legislative authority, operate trains to and from the City of Shreveport, State of Louisiana (See Chapter 120, page 206, General Laws Twenty-sixth Legislature of Texas). Had the court held, as under the law it should, that there is no legal objection to the operation by petitioner of trains outside the State of Texas, it would have rendered judgment for petitioner, because it correctly held upon the original submission of the case that the trains, being interstate, were subject to regulation by the Interstate Commerce Commission, which holding was not set aside or modified in the opinion granting the state's motion for a rehearing, such opinion simply holding that the trains were intrastate, and this principally because petitioner had no right to operate trains outside the State. The ruling, therefore, destroyed a defense upon which petitioner relied, which should have been sustained.

247

(*e*) The Court of Civil Appeals held that Passenger Circular No. 18 does not deprive petitioner of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, whereas, it should have held to the contrary, and, had it so held, judgment would have been rendered for petitioner. The undisputed facts show, and the Court of Civil Appeals so found, that petitioner furnishes adequate train service for the accommodation of local service along its lines independent of Trains Nos. 9 and 209, and, since it appears without contradiction that the operation of additional trains is necessary to meet the requirements of Passenger Circular No. 18, the necessary effect of the Circular, as construed by the judgment of the court, is to compel petitioner to operate trains for which there is no public demand or necessity, which takes its property without due process of law. Had the court so held petitioner would have been entitled to judgment.

(*f*) The Court of Civil Appeals held, in effect, that Passenger Circular No. 18 requires the operation of additional trains when, for any reason, regular trains are not moved within thirty minutes of their schedule, whereas, this is not required by the circular properly construed. A different holding on this proposition would have made necessary a different judgment.

(*g*) The Court of Civil Appeals held Passenger Circular No. 18 a requirement, order, judgment or decree with respect to trains

Nos. 9 and 209, although the Circular was issued in 1907 and the trains were not inaugurated until 1909, thus overruling petitioner's contention, that this condemned without a hearing, contrary to Section 1 of the Fourteenth Amendment. As is apparent, this ruling necessarily affects the result.

(*h*) The Court of Civil Appeals held that Trains Nos. 9 and 209 are separate trains under Passenger Circular No. 18, whereas, they are parts of and constitute but a single train under said
248 Circular, and had the court so held, the judgment, if any, would have been for $7,000.00 only, since one-half the penalties were assessed for alleged violations of the Circular in the operation of Train No. 209 and the other half in the operation of Train No. 9.

(*i*) The Court of Civil Appeals held that a penalty can be recovered for each day's failure to operate a train in accordance with Passenger Circular No. 18, whereas, the undisputed facts show that petitioner did not construe the Circular as applying to its Trains Nos. 9 and 209, and if there was any violation of its provisions by petitioner the violation was single and but one penalty can be recovered therefor. Had the court so held, the judgment would necessarily have been different, twenty-eight penalties having been assessed instead of one.

(3) Again, the Supreme Court has jurisdiction because Article 6552, Revised Civil Statutes, as construed by the Court of Civil Appeals, conflicts with the Commerce clause of the Federal Constitution and violates the Fourteenth Amendment, in that it regulates interstate commerce, and, in requiring the operation of trains for which there is no public necessity, burdens and interferes with such commerce and takes petitioner's property without due process of law.

Each and all of the foregoing erroneous rulings were called to the attention of the Court of Civil Appeals by petitioner in its motion for rehearing filed therein, but, notwithstanding this, the court maintained its holdings and overruled the motion and each of the errors hereinafter assigned.

II.

First Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's second assignment in its brief, as follows:

249 "The court erred in overruling defendant's demurrer to plaintiff's original petition, for the reason that said Passenger Circular No. 18 of the Railroad Commission, upon which this suit is based, is in substance but a restatement of the duties imposed by Article 4494 of the Revised Statutes of Texas upon railroad companies, and adds nothing whatever thereto; that under the statute the duty of the Railroad Commission is limited to correcting abuses, and the only way it can correct an abuse with reference to the operation of trains under Article No. 4494 is to have a hearing upon the

subject, and upon the facts heard base its judgment, order or decree requiring the railroad company to do or not to do some particular thing. For the violation of such an order a penalty might be recovered, but no penalty can be recovered for the violation of a general order which simply restates the statutory duty, and is not based upon any particular state of facts. That plaintiff's petition in this case shows that the order made the basis of this suit was general and was not a judgment, order or decree based upon facts with reference to the operation of the train or trains involved, and no penalty whatever can be recovered for a failure to comply with its provisions."

First Proposition—First Assignment.

Under Article 6552, Revised *States* 1911, the power of the Railroad Commission is limited to correcting the abuses therein defined, and that power must be exercised in the regular way, which is by an order, judgment or decree based upon facts sufficient to support the same, adduced at a hearing with respect to a specified matter.

250 Statement.

Passenger Circular No. 18 and Article 6552, Revised Statutes, are set out in the Preliminary Statement.

See ground 6 of petitioner's motion for a rehearing.

Authorities.

Revised Statutes, 1911, Article 6552.
Revised Statutes, 1911, Article 6672.
Railroad Commission Act (Revised Statutes, 1911. Articles 6653-6668).
I. & G. N. R. R. Co. v. Railroad Commission, 89 S. W. 961.
Railroad Commission v. G. H. & S. A. Ry. Co., 112 S. W. 345.
Railroad Commission v. St. L. S. W. Ry. Co., of Texas, 80 S. W. 102.

Second Proposition—First Assignment.

Passenger Circular No. 18 is not alleged to be and it does not purport to be a requirement, order, judgment or decree based upon any facts adduced at a hearing with respect to the operation of petitioner's Trains Nos 9 and 209, and, therefore, it can have no application to said trains.

Statement.

Same as under First proposition.

Second Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's third assignment in it- brief, which reads:

"The court erred in its first conclusion of law, which is as follows:

"The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid,' because rule is not authorized by Article 4494 of the Revised Statutes of Texas, upon which it must depend for validity."

Proposition—Second Assignment.

The facts show conslusively that Passenger Circular No. 18 was not a requirement, judgment, order or decree made by the
251 Railroad Commission with respect to the operation of petitioner's trains 9 and 209, the order having been made more than two years prior to the inauguration of these trains and therefore the order can in no sense be said to be a regulation or correction of an abuse with respect to the operation of such trains. Consequently, it is not, as regards these trains, an order which the Commission had authority to make.

Statement.

See ground 7 of petitioner's motion for a rehearing.

The date of the circular, as shown by the petition, is February 23, 1907 (Tr. p. 4). Petitioner's Trains Nos. 9 and 209 began operating in September, 1909 (S. of F., p. 32). The first conclusion of law made by the trial court reads:

"The order of the Railroad Commission of Texas known as Passenger Circular No. 18, containing said Rule 2 is valid" (Tr., p. 54).

Third Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's sixth assignment in its brief, reading as follows:

"The court erred in its first conclusion of law, which is as follows:

"The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid,' because said order was made and passed long prior to the inauguration of defendant's Trains Nos. 9 and 209, and if construed as applying thereto is illegal and void."

Proposition—Third Assignment.

An order of the Railroad Commission with respect to the operation of trains and their schedules construed as applying to trains in-

augurated subsequent to its promulgation is not authorized by Article 6552, Revised Statutes, and is, therefore, void.

Statement.

Passenger Circular No. 18 was issued February 23, 1907,
252 while Trains 9 and 209 began operation in September 1909. See ground 8 of petitioner's motion for a rehearing.

Fourth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's seventh assignment in its brief, reading:

"The court erred in rendering the judgment against this defendant, and in thereby holding that Article 4494 of the Revised Statutes of Texas, on which Passenger Circular No. 18, is based, and upon which it must depend for validity, was sufficient authority therefor, and for the judgment of the court herein, because said statute refers to intrastate and local trains controlled by the carrier, and not interstate and through trains operated by it jointly with another, the latter being the character of said trains Nos. 9 and 209."

Proposition—Fourth Assignment.

Article 4494, Revised Statutes, now Article 6552, has no application to through interstate trains operated over two or more lines of railroad. It applies only to trains operated exclusively in Texas over a single railroad.

Statement.

The Article, which has already been copied, speaks for itself. Trains Nos. 9 and 209 are through trains operated by petitioner and Missouri, Kansas & Texas Railway Company under a contract between points in Texas and points in Missouri and beyond, as shown by paragraph 5 of the agreed statement of facts used upon the trial and set out on pages 4-7 of this petition.

See ground 9 of petitioner's motion for a rehearing.

Fifth Assignment of Error.

The court erred in overruling petitioner's eighth assignment in its brief, which reads:

"The court erred in rendering judgment against this defendant, and in thereby holding that Passenger Circular No. 18, made the
253 basis of this suit, was sufficient authority for the judgment rendered, because said Circular is intended to apply to intrastate and local trains controlled by the carrier, and not interstate and through trains operated by it jointly with another, the latter being the character of said Trains Nos. 9 and 209."

Proposition—Fifth Assignment.

Passenger Circular No. 18 should be construed as limited to trains operated over single lines of railroad and not as applying to trains operated over two or more lines.

Statement.

Same as under proposition, fourth assignment.

Sixth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's ninth assignment in its brief, reading as follows:

"If the court was correct in holding that Passenger Circular No. 18 was applicable to this defendant's Trains Nos. 9 and 209, then the court erred in not holding said Circular void, because as so construed the same was an- is not authorized by Article 4494 of the Revised Statutes of Texas, and was and is without and beyond the authority of the Railroad Commission."

Proposition—Sixth Assignment.

Passenger Circular No. 18, if construed as applying to trains operated over two or more lines of railroad, is void, because broader than and therefore not authorized by Article 4494 (now 6552), Revised Statutes, upon which it is based.

Statement.

Same as under proposition, fourth assignment.

Seventh Assignment of Error.

The Court of Civil Appeals erred in holding that original Train No. 9 was delivered by Missouri, Kansas & Texas Railway Company to petitioner at Denison, Texas, and that at such point the control and authority of the first named company ended and that of petitioner began.

Proposition—Seventh Assignment.

254 This assignment is submitted as a proposition.

Statement.

Subdivision 5 of the agreed statement of facts, upon which the case was tried, has been set out in the preliminary statement, but we here copy the first paragraph thereof, which reads:

"5. That the railroad of defendant connects with the railroad of Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma

State line, about five miles North of Denison, Grayson County, Texas, which point of connection, for convenience, will hereafter be called Red River. That by an agreement between defendant and said Missouri, Kansas & Texas Railway Company, certain trains, among others the train called by them No. 9, are operated from the North to Denison and are interchanged between the two at Red River, but there is no change in either crew or equipment at Red River, the trains between Red River and Denison consisting of the same equipment and being operated by the same crews of which they consist and by which they are operated upon the railroad of Missouri, Kansas & Texas Railway Company to Red River; that said train No. 9, operated over the lines of both companies, which, for convenience, will hereinafter be called No. 9 from the North, originates in two sections, one at St. Louis and the other at Kansas City, and both of said sections are run over the tracks of the Missouri, Kansas & Texas Railway Company to Parsons, Kansas, where they are consolidated into one train, which runs South over its tracks to Red River, from which point to Denison it is operated over the tracks of defendant. While said train and the crew operating the same are in Oklahoma they are under the jurisdiction and control of the Missouri, Kansas & Texas Railway Company, and while in Texas they are under the jurisdiction and control of the defendant." (S. of —, p. 3.)

255 This assignment is ground No. 1 of petitioner's motion for rehearing in the Court of Civil Appeals.

Eighth Assignment of Error.

The Court of Civil Appeals erred in holding that Denison is the beginning or starting point of trains Nos. 9 and 209, and that, because of this, said trains are intrastate trains, and petitioner, in the operation and management thereof, is subject to the control of the Railroad Commission of Texas.

Proposition—Eighth Assignment.

This assignment is submitted as a proposition.

Statement.

See statement under the seventh assignment of error and also paragraph 5 of the agreed statement of facts, copied on page 121 of this petition.

The second ground of petitioner's motion for a rehearing forms the basis of this assignment.

Authorities.

G. H. & S. A. Ry. Co. v. Wood, Hagenbarth Cottle Co. 105 Tex. 178.
Johnson v. Southern Pacific Co., 196 U. S. 1.
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498.
Railroad Commission of Ohio v. Worthington, 225 U. S. 101.
T. & N. O. R. R. Co. v. Sabine Tram. Co., 227 U. S. 111.
Railroad Commission of Louisiana v. T. & P. Ry. Co. 229, U. S. 336.
North Carolina Ry. Co. v. Zachary, 232 U. S. 248.
Northern Pacific Ry. Co. v. Washington, 223 U. S. 370.
2nd Employers' Liability Cases, 223 U. S. 1.
Southern Railway Co. v. United States, 222 U. S. 20.
256 Kansas City Southern Ry. Co. v. Cook, 140 S. W. 579.
United States v. Chicago Great Western Ry. Co., 162 Fed. 776.

Ninth Assignment of Error .

The Court of Civil Appeals erred in overruling petitioner's twenty-first assignment in its brief, reading:

The Court erred in its sixth conclusion of law, which is as follows: "Said Trains Nos. 9 and 209 of defendant were not engaged solely in interstate commerce, but both of said trains ran wholly within the State of Texas and their crews and a large part of their equipment were picked up at Denison and ran wholly within this state, and a large part of the passengers carried on said trains were intrastate passengers," because the evidence shows that Trains Nos. 9 and 209 did not run wholly within the State of Texas, but were parts of a through interstate train running from the State of Missouri through the State of Kansas and Oklahoma to San Antonio in the State of Texas, and all of the equipment starting at the Northern termini was carried through to destination, and a large part thereof was not picked up at Denison, nor were a large part of the passengers carried on said train intrastate passengers, but not more than thirty per cent thereof were such.

Proposition—Ninth Assignment.

This assignment is submitted as a proposition.

Statement.

The facts as to the character of Trains Nos. 9 and 209 and the points between which they are operated are shown in paragraph 5 of the agreed statement of facts, which has heretofore been quoted.

257 The sixth conclusion of law is correctly copied in the assignment (Tr. p. 55).

The overruling of this assignment was complained of in the sixteenth ground of petitioner's motion for a rehearing.

Tenth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's twenty-second assignment in its brief which reads:

"The court erred in its first conclusion of law which is as follows: " 'The order of the Railroad Commission of Texas known as Passenger Circular No. 18, containing said Rule 2 is valid,' because said defendant's Trains Nos. 9 and 209 is a through interstate train to which said order has no application."

Proposition—Tenth Assignment.

This assignment is submitted as a proposition.

Statement.

See subdivision 5 of the agreed statement of facts, quoted in the preliminary statement.

The overruling of this assignment and also the overruling of the eleventh and twelfth assignments was complained of in the seventeenth ground of petitioner's motion for a rehearing.

Eleventh Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's twenty-third assignment in its brief, reading as follows:

"The court erred in its first conclusion of law, which is as follows: " 'The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid,' because defendant's Trains Nos. 9 and 209 are through interstate trains to which the statute on which said Passenger Circular No. 18 is based, to-wit: Article 4494 of the Revised Statutes of Texas, has no
258 application, and said Circular is therefore unauthorized and void."

Proposition—Eleventh Assignment.

This assignment is submitted as a proposition.

Statement.

Same as under tenth assignment.

Twelfth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's twenty-fourth assignment in its brief, reading:

"The court erred in its first conclusion of law which is as follows:

" 'The order of the Railroad Commission of Texas known as Passenger Circular No. 18 containing said Rule 2 is valid,' because said defendant's Trains Nos. 9 and 209 are through interstate trains and cannot, under the evidence, be brought under the terms of said Circular or the statute upon which it is based, to-wit: Article 4494 of the Revised Statutes of Texas, and as applied to said train said statute and said Circular are void."

Proposition—Twelfth Assignment.

This assignment is submitted as a proposition.

Statement.

Same as under tenth assignment.

See also the following testimony of W. G. Crush:

"The Katy Flyer is exempt from the Thirty-Minute rulings as an interstate train, but it is not anything like the interstate train the Limited is. If there is an exemption that should be made on account of being interstate it should be the Limited." (S. of F. pp. 46 and 47.) "The fact that the trains have been delivered to us late, was through no fault of the Texas Company (petitioner), but there was an obligation on our part to run those trains through to accommodate that traffic on the trains which was interstate traffic." (S. of F. p. 51.)

"No. 9 was scheduled to leave Denison at a certain hour, but it could not leave until it got there. What we published for the
259 information of the public was that that was a through train, to leave Denison when it got there, so that the through passenger would know about where he was. The equipment of No. 9 was from both of the companies. Each company paid its proportion of the expenses of the train. The train was gotten up for the benefit of the interstate business." (S. of F. p. 54.) "The Texas Company (petitioner) is under contract to receive this Train No. 9 from the other Company at the State line. We have a contract with them agreeing to run the train through whenever delivered. It is manifest that we cannot take the train until we get it. If we were to run this special train from Red River or from Denison when the Limited comes in we would still have to run it. The obligation would be to run it through. With regard to holding the Limited over to make connection with some other train, that would put us out of business. It would destroy the usefulness of the train for this through, competitive, interstate business for which the train was put on. We could not hold interstate passengers there until some subsequent train was due to go out." (S. of F. p. 55.)

The equipment of this train and the time table showing its schedule from St. Louis and Kansas City to San Antonio are shown on pages 68*d*, 68*e*, 68*f*, 68*g* and 68*h*, Statement of Facts.

Thirteenth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's twenty-fifth assignment in its brief, which reads:

"The court erred in its second conclusion of law which is as follows:

" 'Said order of the Railroad Commission is not a regulation of interstate commerce, nor is it an interference with or burden upon such commerce, but rather tends to facilitate both intrastate
260 and interstate commerce, and promotes the convenience of the traveling public,' because under the facts of this case and as applied by the court, the said order of the Railroad Commission operates as and is a regulation of interstate commerce and operates as and is an interference therewith and a burden thereon, and it does not tend to facilitate interstate commerce or promote the convenience of the traveling public."

Proposition—Thirteenth Assignment.

An order of a State Railroad Commission requiring railroad companies to have a fixed schedule for passenger trains and to operate the same in accordance with such schedules, barring unavoidable accidents, if construed as applying to a through train operated by two railway companies, under contract, between points in different states, primarily for the accommodation of interstate traffic and about seventy per cent. of whose traffic is interstate, and if further construed as requiring the operation of additional trains when the regular trains cannot be operated according to their schedules, is, as to such trains, a regulation of, a burden upon and an interference with interstate commerce, and is void under the commerce clause of the Federal Constitution.

Statement.

The court's second conclusion of law is correctly copied in the assignment (Tr. p. 54).

The interstate character of Trains Nos. 9 and 209 is shown in the preliminary statement. The Court of Civil Appeals found, as a matter of fact, that about seventy per cent of the traffic carried on these trains was interstate. W. G. Crush testified that about 110 passengers daily were delivered by Missouri, Kansas & Texas Railway Company to petitioner at Red River, and that to hold these passengers at Denison for other trains would defeat the very
261 purpose for which trains Nos. 9 and 209 were put on and would destroy petitioner's interstate business carried on them (S. of F. p. 55).

Mr. Crush also testified that the equipment necessary to operate special trains similar to Nos. 9 and 209 when No. 9 from the North was delivered to petitioner would be about $400,000.00 if sufficient equipment were used, and that it would take at least $300,000.00

worth of equipment to operate on, and further that the cost of operating these special trains would be $1.00 per mile. (S. of F. pp. 35, 36, 37, 57, 48, 49, 50, 54, 58 and 64.) J. Munday, petitioner's division superintendent, placed the cost of operation at about 80c. per train miles (Statement of Facts, p. 64). Mr. Crush further stated that since trains similar to Nos. 9 and 209 would not have been necessary to accommodate the business smaller trains could have been run, the cost of equipping which would have amounted to probably $120,000.00, not including engines (Statement of Facts, pp. 49 to 51).

The following is quoted from Mr. Crush's testimony:

"It would really have been practically impossible to run those special trains. In the first place, those trains Nos. 9 and 209 are advertised to have certain equipment. It would be practically impossible to have assembled and maintained that equipment at Red River or Denison to take those trains out when delayed, the motive power could not have been there. It is not possible to operate a special train of that character and nature, on a few minutes' notice. Aside from that the cost that would have been necessary to maintain all of that equipment at Red River would have been an expense that would have been absolutely prohibitory; it could not have been done, even if we had wanted to. In the first place, the Pullman Company would not have furnished sleepers, particularly of that type. It would have been an investment of at least four complete trains to always be in position, and that much mo-
262 tive power out of Denison, to say nothing of the additional motive power from various division points and terminals on through to destination; it would have been a great many thousands of dollars. It cost a million dollars to equip the 'Limited' for operation. It would not cost quite half that much to equip the special trains; it would cost about four hundred thousand dollars; it would have cost many hundred thousands of dollars to furnish that extra train service, and that in no way would have relieved us from running through these daily through trains when they arrived at Red River. The 'Limited' was advertised and published to the world as a through train from Kansas City and St. Louis to San Antonio, and it had to go through regardless of when it arrived at Red River." (Statement of Facts, pp. 36 and 37.)

Authorities.

H. & T. C. R. R. Co. v. Mayes, 201 U. S. 321.
Central of Georgia Ry. Co. v. Murphy, 196 U. S. 194.
Yazoo and Mississippi Valley R. R. Co. v. Greenwood Grocery Co., 227 U. S. 1.
Barrett v. City of New York, 232 U. S. 14.
Southern Railway Co. v. Reid, 222 U. S. 424.
Southern Railway Co. v. United States, 222, U. S. —.
Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612.
Adams Express Co. v. Croninger, 226 U. S. 491; C. R. I. P. Ry. Co. v. Hardwicke Elevator Co. 226 U. S. 426.
Kansas City Southern Ry. Co. v. Carl, 227 U. S. 657.
The Minnesota Rate Cases, 230 U. S. 352.
The Shreveport Case, 233 U. S. —.
Kansas City S. Ry. Co. v. Kaw Valley Drainage District 233 U. S. 75.

263 Fourteenth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's twenty-sixth assignment in its brief, reading:

"The court erred in its third conclusion of law which is as follows:

" 'Whatever effect said order may have on interstate commerce is only incidental, and then only on account of a violation thereof by defendant,' because under the uncontroverted facts in this case the interference with and regulation of interstate commerce and the burden imposed upon interstate commerce by said order is palpable and direct, and not in any wise incidental."

Proposition—Fourteenth Assignment.

This assignment is submitted as a proposition.

Statement.

Same as under proposition, thirteenth assignment.

Fifteenth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's twenty-seventh assignment in its brief, which reads:

"In this case the evidence showed that by agreement the Missouri, Kansas & Texas Railway Company, a Kansas corporation, and this defendant, a Texas corporation, established, equipped, advertised and had in operation in September, October and November, 1910, a through interstate route for the transportation of passengers, baggage, mail and express over their respective lines between the cities

of St. Louis and Kansas City, in the State of Missouri, on the North, and the City of San Antonio, Texas, on the South, and intermediate interstate points, the line of railway of the Missouri, Kansas & Texas Railway Company extending from St. Louis and Kansas City in the State of Missouri through the States of Kansas and Oklahoma
264 to Red River, or the Texas-Oklahoma State line, and the line of railway of this defendant extending from said latter point into the State of Texas, and, among other points, to San Antonio in said State; and that this defendant's Trains Nos. 9 and 209 and Trains Nos. 10 and 210 were facilities for and used exclusively in the operation of such through interstate route, and as such were governed and controlled by the following provision of Section 1 of the Federal Act to regulate commerce as amended June 18, 1910, to-wit: 'And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, or storage, and the handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and establish through routes and just and reasonable rates applicable thereto; to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable sompensation to those entitled thereto." That because of this provision and the provisions of Section 15 of the Act which gives the Interstate Commerce Commission authority to establish through routes, and to make rules and regulations for the operation thereof, the said trains hereinbefore mentioned and the operation thereof, the same being through interstate trains primarily established for the benefit and convenience of interstate traffic, and almost exclusively devoted to such traffic, as shown by the evidence, this defendant ha-ing provided ample local trains to care for its interstate traffic, were under the jurisdiction of the Interstate Commerce Commission and subject to the control
265 and regulation of the Acts of the Federal Congress relative to interstate commerce, and not subject to regulation by the Railroad Commission of the State of Texas, and the said order of the Railroad Commission of Texas upon which this suit is based, known as Passenger Circular No. 18, is therefore an unwarrantable interference with interstate commerce and imposes a burden thereon contrary to the provisions of the Constitution of the United States delegating to the Federal Congress power to regulate and control interstate and foreign commerce. Because of the foregoing matters set out in this paragraph the court erred in rendering judgment against this defendant."

Sixteenth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's twenty-eighth assignment in its brief, reading as follows:

"In this case the evidence shows that Trains Nos. 9 and 209, parts of No. 9 running South into Denison from the States of Missouri, Kansas and Oklahoma (and their counterparts, Nos. 10 and 210, running North from and out of the State of Texas into the States of Oklahoma, Kansas and Missouri), were established, equipped, advertised and operated in September, October and November, 1910, jointly by this defendant and the Missouri, Kansas & Texas Railway Company primarily for the benefit and convenience and for the transportation of interstate traffic, to-wit: passengers, baggage, mail and express, between St. Louis and Kansas City, Missouri, on the North, and San Antonio, Texas, on the South and intermediate interstate points; that the equipment of such Trains Nos. 9 and 209, consisting of baggage, mail and express cars, chair cars and coaches, and standard Pullman
266 sleepers, was run through from San Antonio, Texas, and other Texas points, to St. Louis and Kansas City in the State of Missouri, and thereupon run from such Northern termini again, and so on continuously, and that at least seventy per cent of the traffic on said Train Nos. 9 and 209 was interstate; that the said Trains Nos. 9 and 209 were through interstate trains and but a part and parcel of a through, continuous and interstate train designated as No. 9, operated from St. Louis and Kansas City, Missouri, through the State- of Missouri, Kansas and Oklahoma into Denison, Texas, and points South thereof by the said Missouri, Kansas & Texas Railway Company and this defendant, the former operating said train on its own tracks and under its *own tracks and under its* own exclusive control to the Texas-Oklahoma State line, commonly known as Red River, and there delivering said train to this defendant, who owns and operates a line of railroad running South into Texas from the Texas-Oklahoma State line, as aforesaid and this defendant operated the said trains so delivered to it at the said State line into Denison and on to the South, the said Train No. 9 at Denison being divided into two sections or parts, one designated for convenience of operation No. 209, running South to Hillsboro, Texas, via Fort Worth, and the other section continuing under the same designation of No. 9, running via Dallas to the said town of Hillsboro, at which latter point said train No. 209 was again consolidated with said Train No. 9, and the latter thereupon proceeded South to its final destination at San Antonio, Texas, as aforesaid; that defendant's local and intrastate service outside of and independent of Nos. 9 and 209 has at all times been sufficient and ample for the needs of the public, and there has never been any necessity for an increase therein. Because of these facts the court erred in holding that the defendant was subject to the penalties for which judgment was rendered against it, or any of them, for the reason that the order of the Railroad
267 Commission of Texas, known as Passenger Circular No. 18, upon which said penalties and judgment are based by reason of the facts aforesaid, was and is an interference with and an regulation of interstate commerce, and a burden upon such commerce, all of which is inhibited by the Constitution of the United

States which delegates to the Federal Congress the sole power to regulate interstate and foreign commerce."

Seventeenth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's twenty-ninth assignment in its brief, reading:

"The court erred in rendering judgment against this defendant because Article 4494 of the Revised Statutes of Texas and Passenger Circular No. 18, made the foundation of this suit, are both null and void as and when applied to defendant's Trains Nos. 9 and 209, and the instrumentalities and facilities used in the operation thereof, the same, on account of its relation to and connection with interstate commerce, being subject to the control and regulation prescribed by the Acts of Congress of the United States relative to interstate commerce, and, under the evidence, exempt from the control and operation of Article 4494 of the Revised Statutes of Texas and the said Passenger Circular No. 18."

Eighteenth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirtieth assignment in it- brief, which reads:

"If the court was correct in holding that Passenger Circular No. 18, when properly construed, applied to defendant's Trains Nos. 9 and 209, and that as so construed the same was authorized by Article 4494 of the Revised Statutes of Texas, then the court erred in not holding said order and statute void, because said Trains Nos. 9 and 209 and the instrumentalities and facilities used in the operation thereof were engaged in through-route interstate commerce, and by reason thereof subject to the regulation and
268 control prescribed by the Acts of the Congress of the United States, and not subject to such regulation by the State of Texas through Legislature and Railroad Commission as prescribed and provided by said Article 4494 of the Revised Statutes of Texas and Passenger Circular No. 18."

The fifteenth, sixteenth, seventeenth and eighteenth assignments present the same question and will be submitted together.

First Proposition—Fifteenth, Sixteenth, Seventeenth, and Eighteenth Assignments.

A through passenger train operated by two railway companies under agreement between points in different States is an instrumentality and facility of carriage within the meaning of the Act to Regulate Commerce, the jurisdiction to regulate and control which lies with the Interstate — Commission and not with the Railroad Commission of Texas.

Statement.

The interstate character of Trains Nos. 9 and 209 is fully shown by paragraph 5 of the agreed statement of facts quoted in the preliminary statement and by the statements under the twelfth and thirteenth assignments herein.

See ground 20 of petitioner's motion for rehearing, where the overruling of these assignments is complained of.

Authorities.

Act to Regulate Commerce as amended to date, Sections 1 and 15, and the other authorities cited in support of the proposition under the thirteenth assignment.

Second Proposition—Fifteenth, Sixteenth, Seventeenth, and Eighteenth Assignments.

269 Where a railroad company has already provided ample facilities for the adequate accommodation of the traveling public, such as may be proper and reasonable at any given point, and operates in addition thereto through trains for the accommodation of interstate passengers, an act of a State legislature or of a railroad commission affecting the operation of such through trains is a burden upon and an interference with interstate commerce.

Statement.

It appears without contradiction that Trains Nos. 9 and 209 were put on primarily to accommodate interstate traffic, and the Court of Civil Appeals found as a fact that about seventy per cent of the passengers carried on them were interstate. The court also found that petitioner had adequate train service for the accommodation of its local travel independent of Trains Nos. 9 and 209.

Authorities.

Herndon v. C. R. I. & P. Ry. Co., 218 U. S. 135.
Atlantic Coast Line v. Wharton, 207 U. S. 327.
Mississippi Railroad Commission v. Illinois Central Ry. Co., 203 U. S. 355.
Big Four v. Illinois, 177 U. S. 574.
L. S. & M. S. Ry. Co. v. Ohio, 173 U. S. 283.
Gladson v. Minnesota, 166 U. S. 427.
Illinois Central Ry. Co. v. Illinois, 163 U. S. 142.

Third Proposition—Fifteenth, Sixteenth, Seventeenth, and Eighteenth Assignments.

An order of a railroad commission which requires the operation of an additional train when a through interstate train is late in reaching any station en route or which in the alternative, imposes

upon the carriers the duty of requiring the interstate passengers to wait at such station until the departure of the next regular train, is a burden upon and an interference with interstate commerce.

270 Statement.

See statement under last preceding proposition and also the statement supporting the proposition under the thirteenth assignment of error.

Authorities.

G. C. & S. F. Ry. Co. v. Hefley, 158 U. S. 98.
H. T. C. Ry. Co. v. Mayes, 201 U. S. 321.
Central of Georgia Ry. Co. v. Murphey, 196 U. S. 194.
McNeil v. Southern Ry. Co., 202 U. S. 543.
Southern Ry. Co. v. Reid, 222 U. S. 424.
Southern Ry. Co., v. Reid & Beam, 222 U. S. 444.

Nineteenth Assignment of Error.

The Court of Civil Appeals erred in holding that petitioner, being a State railroad corporation, has no right to operate trains outside the State of Texas.

Proposition—Nineteenth Assignment.

This assignment is submitted as a proposition.

Statement.

The principal reason given by the Court of Civil Appeals for holding that Trains Nos. 9 and 209 are State trains was that petitioner has no right to operate trains beyond the State line. This ruling is complained of and shown to be without foundation in the second ground of petitioner's motion *or* a rehearing and the argument thereunder.

Twentieth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty-first assignment in its brief, which reads:

"The Court erred in its seventh conclusion of law wherein it finds that on thirteen certain dates therein set out defendant wilfully disobeyed and violated said order of Railroad Commission
271 of Texas by holding its Train No. 9 at Denison more than thirty minutes after it was due to depart therefrom by its regular published and advertised schedule, for the purpose of making connection with the M., K. & T. Train No. 9 from the North, and when said last named train was, before defendant's train was scheduled and due to depart from Denison, reliably reported to defendant's agent at Denison to be more than thirty minutes late,

because the evidence fails to show that defendant wilfully disobeyed or violated said order, but shows the contrary, and because it affirmatively shows that on the thirteen occasions in question this defendant did not hold said Train No. 9 at Denison more than thirty minutes after it was due to depart therefrom by its regular published and advertised schedule, but that on the contrary it pulled said train from Red River to and out of Denison promptly and with all reasonable dispatch, upon receiving the same from its connection from the North, the Missouri, Kansas & Texas Railway Company, at Red River, and the failure to leave Denison sooner on said thirteen occasions was due to the fact that on each occasion the said Missouri, Kansas & Texas Railway Company was late in delivering said Train No. 9 from the North and equipment thereof and passengers, baggage, mail and express thereon, to this defendant at Red River, or the Texas-Oklahoma State line, and this defendant could not pull said train from Red River to and out of Denison and to the South until it was delivered to it by its said connection and had defendant's connection not been late, as aforesaid, defendant would not have been late, and would have pulled said Train No. 9 out of Denison to the South as per it- published schedule."

Twenty-first Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty-second assignment in its brief, reading:

"The court erred in its ninth conclusion of law wherein it
272 finds that on fourteen certain dates set out in said finding defendant wilfully violated and disobeyed said order of said Railroad Commission of Texas by holding its Train No. 209 at Denison more than thirty minutes after it was due to depart therefrom according to its regular published and advertised schedule for the purpose of making connection with the said M. K. & T. Train No. 9 from the North, and when said last named train was, before defendant's Train No. 209 was scheduled and due to depart from Denison, reliably reported to defendant's agent at Denison to be more than thirty minutes late, because the evidence shows that defendant did not wilfully violate or disobey said order at any time, and that defendant did not, on the occasions in questions, or any of them, hold said Train No. 209 more than thirty minutes after it was due to depart, but that said Train No. 209 was a part of and largely made up of the equipment of said Train No. 9 from the North, which, on the fourteen occasions in question, was delivered to defendant late at Red River by its connection, the Missouri, Kansas & Texas Railway Company; that on said occasions said train, as soon as it was received by this defendant at Red River, was pulled into Denison with all reasonable dispatch, and such portion thereof as was advertised to go by Fort Worth to Hillsboro was immediately made up as Train No. 209, and speedily pulled out of Denison; that said Train No. 209 could not be pulled out of Denison until No. 9 from the North, of which it was a part, was delivered to this defendant at Red River, and by it pulled into Denison, and had

defendant's said connection at Red River not been late, as aforesaid, defendant would not have been late in leaving Denison, and would have pulled said Train No. 209 out of Denison to the South as per defendant's published schedule."

273 These two assignments, presenting the same question, will be submitted together.

Proposition—Twentieth and Twenty-first Assignments.

Where two railway companies engage to operate a through train, each having jurisdiction of the train while on its own lines to hold one of the companies responsible for delays on the line of the other is to deprive it of its property without due process of law.

Statement.

The agreed statement of facts shows that the Missouri, Kansas & Texas Railway Company had jurisdiction of this train while in Oklahoma and that petitioner had jurisdiction of it while in Texas (S. of F. p. 3).

The delays referred to in the seventh and ninth conclusions of law were at Denison and were due to the failure of the Missouri, Kansas & Texas Railway Company to deliver Train No. 9 from the North to petitioner in time for it to run the same out from Denison within the time prescribed by Passenger Circular No. 18 (Tr. pp. 55, 56 and 57).

There is no evidence that petitioner had any power or control whatever over the train prior to the time of its delivery to it at Red River. The testimony of Mr. Crush previously quoted shows that petitioner was under contract to accept delivery of the train at that point and run it through, no matter when delivered.

The overruling of these assignments is complained of in the twenty-first ground of petitioner's motion for a rehearing.

Authorities.

The M. K. & T. Ry. Co. of Texas v. State, 100 S. W. 766.
Oregon Railroad & Navigation Co. v. Fairchild, 224 U. S. 510.

274 Twenty-second Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty-third assignment in its brief, which reads:

"The court erred in its tenth finding of law which is as follows:

" 'That none of the delays hereinbefore named as violations of the order of the Railroad Commission of Texas were on account of unavoidable accident en route' because all of the violations found by the court in this case, except the one mentioned in finding of law No. 8, were occasioned by delays over which this defendant had no control, to-wit: delays of and to the Missouri, Kansas & Texas

Railway Company North of Red River, by reason of which said latter company delivered said train No. 9 from the North to this defendant at Red River too late for it to comply with Passenger Circular No. 18 in leaving Denison for the South with its Trains Nos. 9 and 209, and said delays as to this defendant were on account of unavoidable accident en route, and should be so treated and construed."

Proposition—Twenty-second Assignment.

An accident which is beyond the power of a railroad company to prevent is unavoidable.

Statement.

The statement under the last preceding proposition sufficiently covers the delays at Denison.

The court, by its eighth finding of law, found that petitioner violated the order of the Commission in holding its trains No. 9 at Hillsboro 1 hour and 50 minutes October 19th (Tr. p. 56).

The testimony shows that this train was held to await the arrival of No. 209 (S. of F. p. 31). No. 209 was, on the date in question, delayed 1 hour and 50 minutes near Fort Worth by reason
275 of a freight wreck, which the agreed statement of facts shows was an unavoidable accident (S. of F. p. 18).

Previous statements show that No. 9 was divided at Denison, one part going by Dallas and the other by Fort Worth, the latter being called No. 209, and that these parts were combined again at Hillsboro.

This assignment is based upon the twenty-second ground of petitioner's motion for a rehearing.

Authorities.

United States v. Kansas City So. Ry. Co., 189 Fed. 471.

Twenty-third Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty-fourth assignment in its brief, reading as follows:

"The court erred in its twentieth conclusion of fact, which is as follows:

" 'That during the period of time in controversy the defendant could, at reasonable expense, have operated its said Trains Nos. 9 and 209 South from Denison in two sections so as to comply with its published and advertised schedule for said trains' arrival at defendant's several stations South of Denison and still have its interstate passengers arrive at Denison over the M. K. & T. Railway Company on defendant's Train No. 9 because the evidence shows without contradiction that the defendant could not at reasonable expense have operated its said Train Nos. 9 and 209 South from Denison in two sections so as to comply with its published and advertised sched-

ule for said train's arrival at its several stations South of Denison, the evidence showing conclusively that to operate special or additional trains out of Denison on the time of Trains Nos. 9 and 209, when No. 9 from the North was delivered to this defendant too late for it to comply with the terms of Passenger Circular No. 18
276 in leaving Denison for the South, or operate said Train Nos. 9 and 209 in such event in two sections as found by the court, which is the same thing, would have necessitated the incurring of unreasonable expense and there being no traffic demanding the operation of such special or additional trains or sections, wholly unnecessary expense, which expense would have been a direct burden upon interstate commerce, and withal a compliance with Passenger Circular No. 18 would still not have been accomplished."

Proposition—Twenty-third Assignment.

This assignment is submitted as a proposition.

Statement.

The testimony with reference to the cost of operating special trains when No. 9 from the North was delivered to petitioner late is substantially stated under the proposition, thirteenth assignment of error to which reference is here made.

Authorities.

O. R. R. & N. Co. v. Fairchild, 224 U. S. 510.

The twenty-fourth, twenty-fifth and twenty-sixth assignments raise the same question and will be presented together.

Twenty-fourth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty sixth assignment in its brief, reading:

"In this case the evidence shows that Train Nos. 9 and 209 was a part of a through interstate train, established, equipped, advertised and operated during the period in question by this defendant and the Missouri, Kansas and Texas Railway jointly, primarily for the purpose of doing an interstate business between Texas and Missouri and intermediate interstate points, and while not exclusively, in large part devoted thereto, and the evidence shows that all the violations made the basis of the judgment herein, except one
227 grew out of delays in leaving Denison, Texas, which delays were caused or occasioned by the failure of the Missouri, Kansas & Texas Railway Company, a Kansas corporation with which this defendant connects at th- Oklahoma-Texas State line, aforesaid, and over which this defendant had no control or authority whatever, to deliver to this defendant the said through interstate Train No. 9 from the North and the equipment jointly provided, a

aforesaid, by this defendant, and said Kansas corporation for the operation thereof at Red River, or said Texas-Oklahoma State line, on schedule time, so that this defendant might pull the same into Denison over its tracks and arrive in Denison on time to-wit: 6:10 a. m. of each day; that the court's judgment penalizes this defendant because of the failure of its said connecting carrier to deliver to it on time the said through interstate train and not because of any negligence or default or failure of duty on the part of this defendant, and if the order of the Railroad Commission herein sued on or the statute upon which the same is based is authority for such judgment, then both the said order and the said statute are void in that they seek to control, regulate and burden interstate commerce, and because they are arbitrary, unreasonable and unjust as applied to the facts of this case, and deprive this defendant of its property without due process of law, and deny to it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the Unied States. Because of the foregoing matters set out in this paragraph the court erred in rendering the judgment against this defendant."

Twenty-fifth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty-seventh assignment in its brief, which reads:

"The court erred in rendering judgment against this defendant because the evidence shows that said Train Nos. 9 and 209
278 was a part of a through interstate train jointly operated by this defendant and the Missouri, Kansas & Texas Railway Company between St. Louis and Kansas City, Missouri, and San Antonio, Texas, and intermediate points, jointly established and equipped by them, primarily for the purpose of doing an interstate business, and devoted almost exclusively thereto, and because said Train No. 9, and 209 is a part of and a continuation of Train No. 9 from the North, originating in Missouri, as aforesaid, and destined to San Antonio, Texas, and due to arrive in Denison, Texas, at 6.10 a. m. daily from the North, and because said Missouri, Kansas & Texas Railway Company agreed and was under obligation to deliver said train to this defendant at Red River, or the Texas-Oklahoma State line, so that it might pull the same into Denison and arrive there on schedule time, to-wit: 6:10 a. m. of each day, and because the evidence shows that all the violations made the basis of the judgment herein, except one, grew out of delays in leaving Denison, which delays were caused or occasioned by the failure of the Missouri, Kansas & Texas Railway Company, over which this defendant had no control or authority whatever, to deliver to this defendant the said through interstate Train No. 9 and the equipment jointly provided as aforesaid, by this defendant and said Kansas corporation for the operation thereof, at Red River, or said Texas-Oklahoma State line, on schedule time, so that this defendant might pull the same into Denison over its tracks and arrive at said latter place on time, and because it was impossible for this defendant to operate the said Train No. 9 South of Red River and Nos. 9 and 209 out of

Denison to the South until the same and the equipment thereof, provided jointly as aforesaid, was delivered to it by its connecting carrier at Red River or the Texas-Oklahoma line. Therefore, the order of the Railroad Commission herein sued on, known as Passenger Circular No. 18, if considered as applicable to
279 *to* such Train Nos. 9 and 209, is null and void and incapable of performance by this defendant, and the enforcement of same, under the facts and circumstances hereinbefore set out in this paragraph, is arbitrary, unreasonable and unjust, and would deprive this defendant of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States."

Twenty-sixth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty-eighth assignment in its brief, reading as follows:

"The Court erred in rendering the judgment against this defendant because if the order of the Railroad Commission sued on properly construed requires this defendant to run a special train when No. 9 from the North is delivered to it at Red River too late for it to comply with Passenger Circular No. 18, as the court holds, said Circular is a regulation of, and a burden upon interstate commerce, because the evidence shows that many interstate passengers and large quantities of mail, baggage and express, to-wit: about ten carloads thereof all told, are handled on No. 9 from the North daily, and tendered defendant and delivered to it by the Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma State line and received by this defendant and transported by it over its line to Denison and other points in the State of Texas; that it would be illegal, impracticable and practically impossible to hold this train and this traffic, to-wit, passengers, baggage, mail and express at Denison until the schedule time of the departure of some subsequent train several hours late, and Train Nos. 9 and 209 made up of and carrying said equipment received from No. 9 from the North, and the said passengers, baggage, mail and express thereon would have to be run out of Denison as soon as practicable after the arrival of No. 9 from the North thereat and through to their destination at San Antonio
280 and other points in Texas, notwithstanding the said special train or section had theretofore been run out of Denison in accordance with the order herein sued on, and the intention of the State; that the cost of the equipment necessary for the operation of said special train or section would have been hundreds of thousands of dollars and the daily cost of the operation thereof would have been many hundreds of dollars, all of which outlay and expense would have been unnecessary and would have been a total loss to this defendant, there being no traffic demanding the operation of such special train or section, and a direct burden imposed upon this defendant because of its inability to get said through interstate train from its connection at the Texas-Oklahoma State line on time, and its consequent inability and failure to run its interstate train, Nos. 9

and 209, on schedule time; that this regulation and burden could not lawfully be imposed by said statute, Article 4494, of the Revised Statutes of Texas, or by the Railroad Commission acting thereunder on interstate traffic, and was inhibited by the Constitution of the United States giving to Congress the right to regulate interstate commerce and the order of the Railroad Commission, if properly construed by this Honorable Court to so operate, is arbitrary, unreasonable, unjust and void as a deprivation of this defendant of its property without due process of law."

Proposition—Twenty-fourth, Twenty-fifth, and Twenty-sixth Assignments.

To require a railway company to operate an additional passenger train for which there is no public necessity when a through train operated by it and a connecting line is more than a specified time late, the through train being delivered to it by its connection, deprives it of its property without due process of law.

281 Statement.

The Court of Civil Appeals found that petitioner furnishes sufficient train service outside Trains Nos. 9 and 209 to accommodate the local traffic.

It appears without contradiction that No. 9 and 209 are parts of No. 9 from the North, and that since petitioner cannot handle this equipment until it arrives at Denison, the Circular can be complied with only by running additional trains when No. 9 from the North is late. The cost of equipping and operating additional trains is shown in the statement supporting the proposition under the thirteenth assignment.

The overruling of these assignments forms the basis of the twenty-fifth ground of petitioner's motion for a rehearing.

Authorities.

Oregon R. R. & Navigation Co. v. Fairchild, 224 U. S. 510.

The twenty-seventh and twenty-eighth assignments will be submitted together, as they relate to the same question.

Twenty-seventh Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's tenth assignment in its brief, reading:

"The court erred in rendering judgment against this defendant because thereby it penalized this defendant for failure to run a special train or section on the time and schedule of Nos. 9 and 209, notwithstanding this defendant cannot run train No. 9 and 209 out of Denison on schedule time, when No. 9 from the North, of which it is a part, is not delivered to it at Red River on time; that the said order

of the Railroad Commission does not contemplate or require that a special train or section shall be run out of Denison when No. 9 from the North is more than thirty minutes late, and such special
282 train or section, if run, would not comply with said passenger Circular No. 18, nor would it be Train Nos. 9 and 209, for said Train Nos. 9 and 209 is part of a through interstate train made up almost entirely, if not exclusively, of the equipment and traffic, to-wit: passengers, baggage, mail and express, of the said No. 9 from the North delivered to this defendant at Red River by the Missouri, Kansas & Texas Railway Company, as aforesaid."

Twenty-eighth Assignment of Error.

The court erred in overruling petitioner's eleventh assignment in its brief, reading:

"The court erred in construing the order of the Commission, known as Passenger Circular No. 18, as requiring this defendant to run a special or additional train or section out of Denison to the South on the schedule of Train Nos. 9 and 209, when No. 9 from the North was delivered to this defendant too late to enable it to comply with the requirements of said Circular in leaving Denison, because such is not the correct construction of said Circular."

Proposition—Twenty-seventh and Twenty-eighth Assignments.

Passenger Circular No. 18 does not require the running of additional trains when, for any reason beyond the carrier's control, the regular train cannot leave a station within the time prescribed.

Statement.

Reference is here made to Passenger Circular No. 18 and to subdivision 5 of the agreed statement of facts as copied in the preliminary statement of this petition.

It appears without contradiction that Trains Nos. 9 and 209, in connection with No. 9 from the North, are operated by petitioner and Missouri, Kansas & Texas Railway Company primarily for the handling of traffic between points in Texas and points in Mis-
283 souri and beyond and that passengers and trains are interchanged between the two companies at Red River (S. of F. p. 55).

See also the statement supporting the proposition under the thirteenth assignment, where the facts concerning the operation of additional trains when No. 9 from the North is late, as shown.

The overruling of these assignments is complained of in the tenth ground of petitioner's motion for a rehearing.

Twenty-ninth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty-fifth assignment in its brief, reading:

"The court erred in rendering judgment against this defendant, and in not holding Passenger Circular No. 18 as of no *effort* as to this case, because the evidence shows that the through train service afforded by Train Nos. 9 and 209 was inaugurated in September, 1909, and said Passenger Circular No. 18 was adopted in 1907, and not for the purpose of correcting an abuse in the operation of Train Nos. 9 and 209 under the grant of power in Article No. 4494 of the Revised Statutes of Texas, and to construe said Circular as applicable to Train Nos. 9 and 209 would clearly condemn this defendant without a hearing in contravention of the due process clause of Article 1, Section 19, of the Constitution of Texas, and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."

Proposition—Twenty-ninth Assignment.

An order of a railroad commission promulgated February 27, 1907, construed as a judgment or decree with respect to the operation of a train inaugurated in September, 1909, condemns without a hearing and takes property without due process of law.

Statement.

It appears without contradiction that Passenger Circular
284 No. 18 was issued February 23, 1907, and that Trains Nos. 9 and 209 were not operated until September, 1909.

The overruling of this assignment is complained of in the twenty-fourth ground of petitioner's motion for a rehearing.

Thirtieth Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's thirty-ninth assignment in its brief, which reads:

"The court erred in treating Train Nos. 9 and 209 as separate trains, because they are but different parts or sections of one and the same train, and if any penalties had been properly assessable, in their assessment 9 and 209 should have been treated as one and the same train, and not as different trains."

Proposition—Thirtieth Assignment.

This assignment is submitted as a proposition.

Statement.

Paragraph 5 of the agreed statement of facts copied in the preliminary statement herein supports the assignment.

See ground No. 26 of petitioner's motion for a rehearing.

Thirty-first Assignment of Error.

The Court of Civil Appeals erred in overruling petitioner's forty-second assignment in its brief, reading as follows:

"The court erred in holding that defendant had violated Passenger Circular No. 18 twenty-eight times, and in assessing against it twenty-eight separate penalties, because if said Circular was violated by this defendant at all, its violation under the evidence was continuous, and in law not more than two violations, and this only upon the assumption that Train Nos. 9 and 209 were separate trains, and therefore, under no circumstances could twenty-eight penalties be lawfully imposed upon the defendant."

285 Proposition—Thirty-first Assignment.

Where the Railroad Commission makes an order with respect to the operation of trains and a railroad company fails to recognize the order as applicable to one of its trains and declines to operate the train in accordance therewith, there is but a single violation of the order and not a violation for each day.

Statement.

A penalty was asked for each day on which the train was not operated in accordance with the contended for construction of the order and the court awarded penalties accordingly. See the seventh, eighth and ninth conclusions of law, pp. 55 to 57 of Transcript. The evidence is that Trains Nos. 9 and 209 were not exempt from the order, but that appellant did not undertake to operate these trains in compliance with the order. There is no testimony that at any time it adopted or acted upon the construction of the order contended for or treated it as applicable to said trains.

The overruling of this assignment is complained of in the twenty-seventh ground of petitioner's motion for a rehearing.

Authorities.

State v. Railway, 113 N. W. 952.
Griffin v. Railway Co., 73, N. E. 513.
Wilson v. Commonwealth, 87 N. W. 427.

Thirty-second Assignment of Error.

The Court of Civil Appeals erred in setting aside its original opinion and judgment rendered in this cause April 11, 1913, for the reasons stated in said opinion.

286 III.

Argument.

Petitioner filed in the Court of Civil Appeals a printed argument separate and apart from its brief, and it here refers the court to what

is therein stated, on pages 4 to 34 inclusive, in support of the views presented in this petition. It also refers to the argument on pages 1 and 2 and 3 to 9 inclusive of its motion for rehearing.

IV.

Petitioner respectfully represents that Honorable B. F. Looney, Attorney General of the State of Texas, and Honorable Luther Nickels, Assistant Attorney General, both of whom reside in the City of Austin, are attorneys of record for defendant in error.

V.

Wherefore, petitioner prays that proper service be had as required by law; that this petition be granted, and that upon a hearing the judgment of the Court of Civil Appeals and that of the trial court be reversed and judgment be here rendered in its favor.

Respectfully submitted,

CHARLES C. HUFF,
FISET, McLENDON & SHELLEY,
A. H. McKNIGHT,
Attorneys for the Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error.

Clerk's Office, Supreme Court of Texas.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing 58 pages contain a true and correct copy of the original petition for writ of error now on file in this office, in App. No. 9049, the Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error, vs. The State of Texas, defendant in error.

287 Witness my hand and the seal of the Supreme Court of Texas, at the city of Austin, this February 7, 1916.

[SEAL.] F. T. CONNERLY,
Clerk Supreme Court.

(Endorsed:) App. No. 9049. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, July 10, 1914 R. H. Connerly, Cl'k. Filed in Supreme Court Aug. 25, 1914. F. T. Connerly, Clerk, by H. L. Clamp, Deputy. Refused Jan. 12, 1916. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Feb. 7, 1916. R. H. Connerly, Clerk. App. No. 9049. No. —. In the Supreme Court of Texas. The Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error, vs. The State of Texas, Defendant in Error. Appeal from the District Court of Travis County. Petition for Writ of Error. To the Third Court of Civil Appeals. Charles C. Huff, Fiset, McLendon & Shellwy, A. H. McKnight, Attorneys for The Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error.

288 In the Supreme Court of Texas.

M., K. & T. Ry. of Texas
vs.
State of Texas.

From Travis County, Third District.

January 12th, 1916.

This day came on to be heard the application of M. K. & T. Ry. Co. of Texas for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that said application be refused. That the applicant M. K. & T. Ry. Co. of Texas, and its surety, American Surety Co. of New York pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court this the 4th day of Feb'y A. D. 1916.

[SEAL.]

F. T. CONNERLY, *Clerk.*
By H. L. CLAMP, *Deputy.*

(Endorsed:) Application No. 9049. M. K. & T. Ry. Co. of Texas vs. State of Texas. Copy of Judgment in Supreme Court. Application for writ of error refused. Filed in Court of Civil Appeals 3rd Supreme Judicial District Austin Tex. Feb. 4th, 1916. R. H. Connerly, Clerk.

289 Application No. 9049.

The Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error,
vs.
The State of Texas, Defendant in Error.

(From Travis County, Third District.)

Petition for Writ of Error.

The case involves the validity of what is commonly known as "The Thirty Minute Order" of the Railroad Commission of Texas as applied to certain trains of the plaintiff in error, which, according to its claim, were interstate in character and, therefore, not subject to the regulation. The question presented is a vital one, concerning in a large measure the powers of the Railroad Commission and important also to the railway carriers of the State; and it is preferable for this reason that the views of the court in its action upon the petition be briefly stated.

The order of the Railroad Commission was issued under the authority of Art. 6552, Revised Statutes of 1911, and reads:

"Each and every railroad company operating a railroad in this state shall start its passenger trains from the points of origin in accordance with advertised schedule, and said trains, except from unavoidable accidents thereto enroute, shall observe and conform to the published schedule as to arrival and departure at the several stations on the line; provided that trains may be held not to exceed thirty (30) minutes at origin or at junction points with other lines to make connection with trains on such other lines. If,
290 at the expiration of said thirty minutes, connecting trains are in sight, ten minutes, in addition to said thirty minutes, will be allowed in which to make the connection. Where connecting trains arrive within the time above allowed a reasonable time, in addition to that provided for, will be allowed for transfer of passengers, mail, express and baggage. Where connections are reliably reported to be more than thirty minutes late, no wait will be made."

For its violation by the plaintiff in error in the operation of the trains in question, the suit was brought by the State for the recovery of penalties, a judgment for the state resulting, affirmed by the Court of Civil Appeals, 167 S. W. 822.

The trains were through passenger trains from St. Louis and Kansas City, Missouri, to points in Texas; operated by the Missouri, Kansas & Texas Railway Company to Denison, Texas, and from there to destination by the plaintiff in error under a contract with that company; and it appears from the proof that a considerable portion of their passenger traffic was interstate.

Because the trains were operated by the plaintiff in error altogether in Texas, and, as held, its want of authority as a corporation chartered in Texas to operate them beyond the State line, the honorable Court of Civil Appeals concluded in its opinion on rehearing that they were to be treated as purely intra-state trains, and upon that ground rested its decision. But under the proof that the traffic of the trains was largely interstate, we think they must be regarded in the case as instrumentalities of interstate commerce. Being employed in the movement of such traffic, it is difficult to perceive how they can be differently regarded; and we shall so treat them.

There is accordingly presented the simple question as to the power of the Railroad Commission to provide and enforce a regulation of this character as applied to trains employed in interstate commerce by railway companies operating in this state.

291 While by the Federal Constitution Congress is empowered to regulate commerce with foreign nations and among the several states, there remains in the states the power, distinct from any granted to the Federal Government, to prescribe, within constitutional limitations, relative rights and duties of persons and corporations within their jurisdiction in the interest of the public convenience and for the public good. It is a power still valid and effectual, though its exercise may relate to subjects over which Con-

gress possesses, but has not exerted, authority. It can not be supposed that a sovereign state in the grant of the rights and privileges accorded by its laws to railway carriers is required to wholly surrender its authority over them simply because they may engage in interstate commerce. Nor is it to be assumed that such rights and privileges are extended merely for their benefit as interstate carriers, or to subserve the interest of those making use of them for that character of traffic. There are certain duties whose performance by common carriers in the State the police power of the State may exact, notwithstanding their employment in interstate commerce; and that power is not nullified by the mere fact that they are so employed. Its valid exercise in relation to carriers engaged in such commerce, as well as their instrumentalities so used, is dependent upon other considerations; and the principles which in the particular case determine the question are well established.

The Supreme Court of the United States, which is invested with the ultimate authority of determining these questions, recognizes three classes of cases respecting the power of the State over the subject of commerce. To use the language of one of its opinions, they are:

1. Those in which the power of the State is exclusive.
2. Those in which the States may act in the absence of legislation by Congress.
3. Those in which the action of Congress is exclusive and the State can not interfere at all. In relation to cases of the
292 second class, it is the exercise by Congress of its power to regulate commerce, and not the mere existence of such power in Congress, which renders inconsistent the exercise of the same power by the state; and the state is free to exert its power where Congress has not acted. If the subject of the particular state enactment is national in its character, the absence of legislation by Congress amounts to an indication of its will that, as affected by such subject, commerce shall be left untrammelled, and the State regulation is of no effect. But it is equally true that an enactment of the State may be valid though it incidentally affects interstate commerce. The authority of the State to enact legislation which is in aid of such commerce, as distinguished from that which burdens or interferes with it, is likewise recognized.

These are the principles of law which govern the present question, as clearly recognized and plainly declared in repeated adjudication of the United States Supreme Court upon the subject. Covington, etc. Bridge Company vs. Kentucky, 154 U. S. 204; Western Union Telegraph Company vs. James, 162 U. S. 650; New York, New Haven & Hartford Railroad Company vs. New York, 165 U. S. 628; Lake Shore & Michigan Southern Railway Company vs. Ohio, 173 U. S. 285; Mobile County vs. Kimball, 102 U. S. 691; Gladson vs. Minnesota, 166 U. S. 427.

Applying them in the present case for the purpose of determining the validity of the Railroad Commission's order in its relation to interstate trains, what is the result? It is clear, we think, that in its legislation with respect to interstate commerce Congress has not

dealt with the subject matter of the order. With the order producing no conflict with any expression by Congress of its power over the subject, is the state, through its administrative agency established for the regulation of railroads operating within its limits, yet powerless to require their maintenance of the schedules of such of their trains as may have an interstate character, leaving those trains altogether free from any proper regulation of that
293 nature? We do not think its authority is to be considered as so reduced.

The order is very plainly not directed against interstate commerce. It is not an attempt to regulate commerce. It has to do merely with the manner of the operation of trains. It has no further objects than to bring about dispatch and certainty in their operation as essentials of efficient service to the public. And it seeks to do more than require that kind of operation merely within the limits of the state. The effect of its observance upon commerce, whether domestic or interstate, is purely incidental, since as a consequence of its obedience commerce will be affected as the result of only the ordinary operation of trains upon their schedule time. It is no more of a regulation of commerce, and in particular is it no more of a burden upon or interference with commerce in its effect, then familiar enactments requiring competency of train operatives as a means of affording safety to passengers and coemployes. It will hardly be denied that in the absence of action by Congress the police power of the State may be validly exercised to promote the safe carriage of passengers upon interstate trains. New York, New Haven & Hartford Railroad vs. New York, 165 U. S. 628. If so, by what authority is the state, under a similar condition, to be deprived of the exercise of its rightful powers for the furtherance of their prompt carriage by such trains?

So far as it may affect interstate commerce, the order is a regulation in aid of commerce. It is difficult to conclude that a requirement whose natural effect upon commerce is to facilitate its prompt movement through the observance of train schedules and connections, constitutes an interference with commerce, or in any just sense a burden upon it. There being no legislation by Congress which renders inconsistent such action by the State, the order of the Railroad Commission in such bearing as it has upon interstate commerce is accordingly a regulation which the state had the full authority to provide in the exercise of its sovereign powers, under which its right to reasonably prescribe the duties of railway
294 companies within its limits is clear and undoubted.

Since the order in question as applied to interstate trains cannot in our opinion be regarded as an interference with interstate commerce, the case is to be clearly distinguished from those which hold as invalid regulations of a state requiring the stoppage of such trains where adequate local facilities had been provided.

The writ of error is refused.

NELSON PHILLIPS,
Chief Justice.

Opinion delivered January 12, 1916.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing seven pages contain a true and correct copy of the opinion of this Court upon Application for Writ of Error No. 9049, The Missouri, Kansas & Texas Railway Company of Texas, vs. The State of Texas, from Travis County, Third District, delivered January 12, 1916.

Witness my hand and seal of said Court, this the 6th day of February, 1916.

[SEAL.]

F. T. CONNERLY,
Clerk Supreme Court of Texas.

(Endorsed:) App'l No. 9049. M., K. & T. Ry. of Texas vs. The State of Texas. Certified Copy of Opinion of the Supreme Court of Texas. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Feb. 7, 1916. R. H. Connerly, Clerk.

295 In the Supreme Court of Texas.

Application No. 9049.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS,
Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Appeal from the District Court of Travis County.

Application for Writ of Error to the Third Court of Civil Appeals.

Motion of Applicant for Rehearing.

To the Supreme Court of Texas:

Now comes the Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error in the above entitled and numbered cause, and moves the Court to grant it a rehearing upon the application for writ of error filed herein, and upon such rehearing to set aside the Court's order made herein January 12, 1916, refusing the writ of error prayed for, and to allow such writ of error for the reasons hereinafter stated.

First Ground for Rehearing.

The court erred in refusing the writ of error because the order involved is a regulation of, a burden upon and an interference with interstate commerce.

296 Argument.

In determining the validity of the order, we, of course, must look to its effect, and not merely to its form.

If the effect of the order is to regulate, burden or interfere with interstate commerce, no matter what its form, it will be as readily stricken down as if it in terms imposed the burdens.

Considering it in this way, what does it require as construed by the judgment of the trial court? It requires defendant under pain of heavy penalties to run additional trains from Denison, South, one by way of Dallas and another by way of Fort Worth, when Missouri, Kansas & Texas Railway Company fails to deliver regular No. 9 to it at the state line in time to permit it to run the regular trains out of Denison in compliance with the order. The question then is, does the order so construed regulate, burden or interfere with interstate commerce?

As said by the court, there are three classes of cases involving commerce. (1) those in which the power of the State is exclusive; (2) those in which the states may act until Congress legislates; and (3) those in which the power of Congress is exclusive.

We may leave out of consideration the first class of cases. Does this case fall within the third class? There is ground for contending that it does.

The trains were put on primarily to accommodate interstate travel, and the record shows without contradiction that about seventy per cent. of their business was interstate. The trains in question were instrumentalities of interstate commerce, as the court well said. Upon principle any order which relates directly to the movement of such an instrumentality, operated for the purpose stated and carrying principally interstate passengers, ought
297 to be considered a regulation of interstate commerce. If it is a regulation of such commerce, then the state has no power to deal with it, for the Constitution of the United States has given Congress exclusive jurisdiction of the matter, and in such case it is wholly immaterial whether Congress has acted or not. In this field the states have not even a permissive power.

But if the case be considered as falling within the second class, the order must nevertheless be declared void.

In the first place, there is strong reason for contending that Congress has occupied this field; and, if it has, there is no room left for the State to operate. As the Supreme Court of the United States said in C. R. I. & P. Ry. Co. vs. Hardwick Farmers' Elev. Co., 226 U. S. 435, there can be no divided authority over interstate commerce. The regulations of Congress on this subject are supreme, and, when Congress so acts as to manifest a purpose to exercise its constitutional authority, the regulating power of the State ceases to exist. Erie R. R. *Ro.* vs. New York, 233 U. S. 681; Southern Ry. Co. vs. Railroad Commission of Indiana, 236 U. S. 439.

It is true that Congress has passed no law regulating the schedules of passenger trains or requiring carriers to comply with such schedules, nor has the Interstate Commerce Commission undertaken to regulate the matter, but the present Act to Regulate Commerce, as supplemented by the Safety Appliance Acts of Congress, the Federal Employers' Liability act and the Hours of Service Act is so comprehensive that it ought to be said that Congress has occupied the whole

field. Inhibitive congressional legislation is not necessary. Southern Ry. Co. vs. Reid and Beam, 222 U. S. 447. A regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, and it cannot always be said that the power of
298 Congress to regulate is dormant because not affirmatively exercised. Smith vs. Alabama, 124 U. S. 465.

Congress having taken exclusive jurisdiction of the equipment used in the trains by the Safety Appliance Acts (Southern Ry. Co. vs. United States, 222 U. S. 20; Southern Ry. Co. vs. Railroad Commission of Indiana, 236 U. S. 439); of all claims for injuries to the employes operating the trains by the Federal Employers' Liability Act (Mondou vs. N. Y. N. H. & H. R. R. Co., 223 U. S. 1); of the hours that such employes might work by the Hours of Service Act (Northern Pac. Ry. Co. vs. Washington, 222 U. S. 370; Erie R. R. Co., vs. New York, 233 U. S. 61); and of claims for loss of or damage to property handled on the trains (Adams Ex. Co. vs. Croninger, 226 U. S. 491, and the long line of cases following it), it would be inconsistent to leave the states free to control the operation of the trains in the matter of their schedules. Such matter is so vital a part of interstate commerce that, considering the nature of the regulations Congress has made, it ought to be said that it intended this matter to go unregulated. If that was the purpose of Congress, then the State regulation is as clearly void as if it had been expressly forbidden. Smith vs. Alabama, 124 U. S. 465, 473.

The court cites New York, New Haven & Hartford R. R. Co. vs. New York, 165 U. S. 628, in support of its conclusion that the State may make regulations of this kind, notwithstanding the Act to Regulate Commerce. It might as well have also cited Smith vs. Alabama, 124 U. S. 465, and Atlantic Coast Line vs. Georgia, 234 U. S. 280. But the cases are not parallel, to say nothing of the fact that in recent years, even since the passage of the law involved in the Atlantic Coast Line case, Congress has materially enlarged its occupation of this territory and therefore what powers the States might once — exercised in this field furnishes little evidence of their authority today. The regulations involved in the cases cited were
299 enacted to protect the life, limb and health of passengers and employes. They come strictly within the police power of the State. The regulation here involved is not a police measure. As the Supreme Court of the United States said in Herndon vs. C. R. I. & P. Ry. Co., 218 U. S. 157, it is a commerce regulation, and not a police regulation. It might well be held that the States are still free to pass police regulations, but cannot enact strictly commerce measures.

In addition to the cases already cited showing the extent to which Congress has occupied the field of interstate commerce, we might call attention to the Minnesota Rate Cases, 230 U. S. 352; the Shreveport Case, 234 U. S. 342; and Charleston & Western Carolina R. R. vs. Varnille Furniture Co., 237 U. S. 597.

There is still another reason why the order cannot be sustained against this objection, namely, that as a matter of fact it burdens and interferes with interstate commerce.

The court seems to think this case should be distinguished from the class of cases dealing with State regulations requiring trains to stop at designated stations, but we believe they are all controlled by the same principle and have no doubt but the court will so conclude upon further reflection. Of course, the effect of the two kinds of regulations is not manifested in the same way, and therefore it will require different facts to show a burden upon or an interference with interstate commerce in the one case than in the other. But if the facts in reality show such burden or interference, then a regulation requiring a train to maintain its schedule must be stricken down for the same reason as one requiring the train to stop. In other words, the difference is purely one of fact. Concede the effect, and the same rule applies.

The controlling principle has often been stated by the Supreme Court of the United States. The latest expression of it, we believe, is in Chicago, Burlington & Quincy R. R. Co. vs. Railroad Commission of Wisconsin, 237 U. S. 220, from which we quote the following:

300 "In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the re-arrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement."

The other cases dealing with the question, as we have them in mind just now, are, Ill. Cent. R. R. Co. vs. Illinois, 163 U. S. 142; Gladson vs. Minnesota, 166 U. S. 427; Lake Shore R. R. vs. Ohio, 173 U. S. 285; Cleveland, etc. R. R. Co. vs. Illinois, 177 U. S. 154; Mississippi Railroad Commission vs. Ill. Cent. R. R. Co., 203 U. S. 335; Atlantic Coast Line vs. Wharton, 207 U. S. 328; and Herndon vs. C. R. I. & P. Ry. Co., 218 U. S. 135.

Conceding that the order imposes a burden upon interstate commerce, and bearing the four propositions above quoted in mind, it logically and necessarily follows that the regulation of the Commission is void and that the court committed error in not so holding.

To begin with, we have the established fact that defendant had adequately met the local conditions before the trains involved were put on. The court of Civil Appeals in its original opinion said (167 S. W. 824):

"The uncontradicted evidence, we think, amply sustains appellant's contention that during the period in controversy it furnished ample facilities, independent of said through trains, for the
301 accommodation of its through trains, for the accommoda-

tion of its passenger traffic on its lines south of Denison, in that it had three passenger trains each way daily beween Denison and Hillsboro, via Dallas and Ft. Worth, three passenger trains each way daily between Hillsboro and Granger, and two passenger trains each way daily between Granger and San Antonio, in addition to said trains Nos. 9 and 209, or a total of four trains daily each way between Denison and Granger, and three trains each way daily between Granger and San Antonio; two of the additional trains between Denison and Granger stopping each way daily at all regular stations, and one of them between Granger and San Antonio."

The conclusion of the Court of Civil Appeals is binding upon this court; but if it were not, no other conclusion could be reached under the facts as the following evidence from the record, which is nowhere disputed, shows:

"The accommodations offered by those trains (meaning appellant's trains other than Nos. 9 and 209) were very adequate to supply every demand of our local passenger traffic. The Limited (of which 9 and 209 were a part) was not at all required to take care of our Texas traffic, that is, intrastate traffic." (Statement of facts, p. 37).

"I have stated that we have adequate facilities for taking care of the Texas traffic in other trains. This proposed extra train out of Denison would take care of the traffic originating at Denison and such as we would pick up on the way. One coach would take care of it. We would not have to have so big a train, only not to mislead the people or misrepresent our advertisement. One coach would take care of all the traffic, but we do not need the train at all, because the business is not there for the train." (Statement of Facts, p. 49.)

302 "There was no need to start a train out of Denison when that train was late. I don't think there has ever been such need of it. The hour of departure is such that there was no need of it." (Statement of Facts p. 51.)

Having met the local conditions, then defendant had performed its obligation to the state, to adopt the language of the second proposition, and the regulation of its trains by the Commission is an improper and illegal interference with interstate commerce.

This leaves the only question for consideration in this connection, whether the order of the Commission in fact burdens or interferes with interstate commerce, which question, however, the court in its opinion does not discuss, the opinion being confined exclusively to principles of law.

As above stated, in considering this question, we must look to the effect of the order; and, when that is done, the facts of the case, by which the court must be guided, inevitably require an affirmative answer.

The order, as construed by the judgment, requires defendant to run special trains when for any reason the regular trains cannot be run in compliance with its provisions. It either has to make up special trains and run them in addition to the regular trains or stop the regular trains when they reach Denison, and require the pas-

sengers to wait for the next train. Saying the trains shall run on time will not make them do so. Defendant receives the trains at the State line from Missouri, Kansas & Texas Railway Company, and no matter what the Commission says, it is powerless to run those particular trains south of that line until they are delivered to it.

The record shows without contradiction that defendant was under contract to run the regular trains through, no matter whether they were delivered to it late or not. The witness Crush testified that defendant did not have the equipment to operate the special
303 trains and that the cost of supplying such equipment, exclusive of the engines, would amount at the least to $120,000 (Statement of Facts pp. 49 to 51). In addition there would be the cost of operating the trains, which was estimated at from 80 cents to $1.00 per train-mile.

We then have this alternative: Defendant, to comply with the order, must spend something like $120,000 for cars and an additional sum for engines, and must bear the expense of running special trains when the regular trains are late, or violate its contract and require a great number of passengers received by it from its connecting carrier at the State line to remain in Denison for several hours to await the departure of other trains. To violate its contract would subject it to damages, and to thus delay its passengers would play havoc with its business (Statement of Facts p. 55), to say nothing of the damage claims resulting therefrom.

Now it must be remembered that defendant is required to incur this enormous expense, or to delay its passengers, destroy its business and subject itself to claims for damages, all because of an effort on its part to operate a train which will meet adequately the needs of its interstate passengers, after it has provided sufficient accommodations for the local travel; and, when this is remembered, the mere recitation of the facts is sufficient to show that the order burdens and interferes with interstate commerce. Argument would seem superfluous.

The court speaks of the order as an aid to commerce, but it, of course, could aid only the passengers traveling on the special trains. The Commission has no jurisdiction north of Red River, and nothing it might do could hurry the trains beyond that point. The order would, therefore, necessarily delay the passengers coming into
Denison from the North, if it had any effect on them; and
304 if it did not effect them, it would require defendant to give the passengers from Denison, south, facilities and accommodations for which there is no public necessity. It will thus be seen that the regulation cannot benefit all travelers using the trains, and that those it does benefit, are benefitted by the imposition of a needless expense upon defendant.

Nor can the order be sustained as a police regulation. It is not a police regulation, as we have shown; but if it were, that would not save it. No proposition is better settled than that the states cannot by an exercise of the police power burden or interfere with interstate commerce.

Second Ground for Rehearing.

The court erred in refusing the writ of error because the order involved takes the property of defendant without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to Section 19, Article 1 of the Constitution of Texas.

Argument.

The case of Great Northern Ry. Co. vs. Minnesota, 238 U. S. 340, leaves but little to be said in support of this proposition. The following is from the syllabus of that case:

"An order of a state railroad commission requiring a railroad company to install and maintain scales amounts to a taking of the company's property; and, if the order is arbitrary or unreasonable, the taking is without due process of law and in violation of the Fourteenth Amendment."

We have shown that the present order as construed in this case requires the running of additional trains, and it is a matter of common knowledge, of which the court will take judicial notice, that this has been the method used by the carriers from the beginning to comply with the regulation. If an order requiring a rail-
305 way company to install and maintain scales amounts to a taking of its property, necessarily, its property is taken if it is required to equip and operate additional trains.

In disposing of that case, the court said:

"Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances.

"The applicable principles were announced in Oregon Railroad &c. Co. v. Fairchild, 224 U. S. 510, 524. A taking of railroad property under administrative regulation must 'be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet.' The facts being established the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not conclusive. Interstate Commerce Commission v. Louis. & Nash. Railroad, 227 U. S. 88, 91; Florida East Coast Line v. United States, 234 U. S. 167, 185."

As previously shown, defendant's facilities were sufficient for the handling of its local business before the trains involved were put on, and there is no public necessity for them to handle such business. Accepting that fact—and there is no escape from it, for the uncontroverted evidence so shown and the Court of Civil Appeals so found—the conclusion irresistibly follows that the order takes defendant's property without due process of law.

Special attention is called to the case of Oregon Railroad &c. Co. vs. Fairchild, 224 U. S. 510, in this connection, in which the

306 court held that an order of a railroad commission requiring a railway company to expend its money and use its property in a specified manner is not a mere administrative order, but is a taking of property; and in which an order of the Railroad Commission of Washington directing certain track connections was held void because as matter of law the evidence failed to show that there was a public necessity for them. Attention is also called to Chicago, Milwaukee & St. Paul R. R. Co. vs. Wisconsin, 238 U. S. 491, where a statute of Wisconsin relating to berths on sleeping cars was held to be arbitrary and unreasonable and therefore *un*valid.

There is another standpoint from which to view this question, namely, that the order is arbitrary and unreasonable and therefore is in violation of the constitutional provision in question, because, as construed in this case, it undertakes to penalize defendant for the shortcomings of another railway company over whose actions defendant has no control.

The trial court assessed penalties against defendant for its failure to run trains out of Denison in accordance with its published schedules, and in every such case its failure was due to the fact that Missouri, Kansas & Texas Railway Company did not deliver the trains to it at Red River in time to enable it to comply with the order. There is nothing showing why Missouri, Kansas & Texas Railway Company was late in making the delivery, but that is wholly immaterial, for the agreed statement of facts shows that the trains were under the jurisdiction and control of that company while in Oklahoma and beyond and that they did not come under the jurisdiction or control of defendant until delivery was made to it at the state line. The thing then that defendant is being penalized for is, its failure to run special trains because a connecting carrier could not or did not deliver the regular trains without delay. In other words, it is being punished, not for any delay of its
307 own in operating trains, but for the delay of another company which operates in other states. It should require no argument to show that an order which permits or requires this takes property without due process of law.

We deem it unnecessary to cite authorities to the court in support of the proposition that statutes and regulations of commissions may be so arbitrary and unreasonable as to violate the due process of law clause of the Constitution. A recent case of the kind, however, decided by this court, is The M. K. & T. Ry. Co. of Texas vs. State, 100 S. W. 766.

Third Ground for Rehearing.

The court erred in refusing the writ of error because the order involved is legislative in character and is not an administrative regulation which it was within the power of the Commission to make, it being simply a restatement of Article 6552, Revised Civil Statutes, in a modified form and not, at least in its application to this case, a requirement, judgment, order or decree of the Commission with respect to any particular state of facts. In other words, the order is

void, and no penalty can be recovered for its violation, because it is an effort on the part of the Commission to define an abuse, and not an effort to correct an abuse already defined by the legislature.

Argument.

We have had several disappointments in this case, but none keener than our inability to induce the court to accept the contention upon which this ground of motion is based. To our mind, the proposition is absolutely clear, and it should be accepted by the court without hesitancy.

The Commission is an administrative body. It can exercise only such powers as have been lawfully vested in it by the legislature. Its action in the present case, if sustained, must be sustained as an exercise of the power given it by the legislature to correct abuses. It cannot correct abuses generally, but only such as have been
308 defined for it by the legislature. Railroad Commission vs. Houston & Texas Central R. R. Co., 90 Tex. 352.

Article 6552 defines an abuse which the Commission in proper cases might correct if it acted in the proper way. But a simple declaration by the Commission that a carrier shall perform the duty which this Article imposes upon it, is powerless to accomplish anything. By making such declaration, the Commission does not undertake to correct the abuse defined by the legislature, it simply gives an amended definition of the abuse. In doing this, it leaves the field of activity in which it may probably work and undertakes to exercise power which under the Constitution rests in the legislature alone.

If the legislature legislates when it says trains shall be run in accordance with published schedules, we are at a loss to understand why the Commission does not legislate when it says the same thing. The character of the regulation must be determined by its nature, and not by the body from which it emanates.

The method of procedure commonly followed by the Commission in correcting abuses is to ascertain whether a particular carrier is performing its duty under the law, and if it is not, to have a hearing for the purpose of determining what the facts are and then to enter such an order as under the facts may be necessary to meet the situation. I. & G. N. R. R. Co. vs. Railroad Commission, 89 S. W. 961; Railroad Commission vs. G. H. & S. A., 112 S. W. 345; and Railroad Commission vs. St. L. S. W. Ry. Co. of Texas, 80 S. W. 102, and that is the only method that can be pursued.

Now, what was done in this case? The Commission made the order in February, 1907. The trains involved were not operated until September, 1909, more than two years and six months thereafter. Clearly, that order is not a requirement, judgment, order or decree as to the operation of these trains. To construe it as such would be a violent abuse of language. No lawful requirement, judgment, order or decree could be made with reference to these trains until defendant began to operate them, and then none could
309 be made without a hearing at which sufficient evidence was adduced to support the same. The Supreme Court of the

United States has held that an administrative body, like the Commission, is without jurisdiction to make orders when there is no evidence upon which to base them. Interstate Commerce Commission vs. L. & N. R. R. Co., 227 U. S. 86. For a much stronger reason a valid order cannot be made in advance of the existence of the facts to which it relates.

We do not say that the Commission is without power to correct abuses arising under Article 6552. On the contrary, we admit that it can correct such abuses, if it proceeds in the proper manner. But what we do say is, that the Commission can lawfully accomplish nothing by proceeding as it has proceeded here.

If, in its opinion, the trains involved in this case are not operated in compliance with this article, a hearing should be had, and an order consistent with the facts then entered directing what defendant shall do. Assuming that such hearing is had, and that an order justified by the law and the facts is entered, defendant can be penalized for failing to comply with it. But there is no warrant under the constitution or the laws of this state for penalizing it because of its failure to observe a mere legislative declaration of the Commission concerning a matter for which the legislature itself has prescribed such regulations as in its judgment were necessary.

Fourth Ground of Rehearing.

The court erred in holding that defendant receives the trains involved from Missouri, Kansas & Texas Railway Company at Denison.

Remarks.

We presume that part of the opinion which states that the trains are operated by Missouri, Kansas & Texas Railway Company
310 to Denison and from that point to destination by defendant, was based upon a similar statement in the opinion of the Court of Civil Appeals. The statement, however, is not consistent with the facts but is directly contrary to them. See the fifth subdivision of the agreed statement of facts, page 3 of the Statement of Facts, which is copied in defendant's original brief filed in the Court of Civil Appeals, in its petition for writ of error, and in its motion for rehearing in the Court of Civil Appeals.

Plaintiff in error respectfully represents that Honorable B. F. Looney, Attorney General of the State of Texas, and Honorable Luther Nickels, Assistant Attorney General, both of whom reside in the City of Austin, are attorneys of record for defendant in error.

Wherefore, plaintiff in error prays that this motion be in all things granted, and that upon a hearing of the cause in this court the judgment of the trial court and of the Court of Civil Appeals be reversed, and judgment be here rendered in its favor. It also prays for general relief.

Respectfully submitted,

CHARLES C. HUFF,
FISET, McLENDON & SHELLEY,
A. H. McKNIGHT,
Attorneys for The Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error.

(Endorsed:) Motion No. 3579. Application No. 9049. In the Supreme Court of Texas. The Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error, vs. The State of Texas, Defendant in Error. Appeal from the District Court of Travis County. Application for Writ of error to the Third Court of Civil Appeals. 2-2-1916. Overruled. Motion of Applicant for Rehearing. Filed in Supreme Court Jan'y 26, 1916. F. T. Connerly, Cl'k, by H. L. Clamp, Deputy.

311 Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing sixteen pages contain a true and correct copy of the original motion for rehearing, now on file in this office, in App. No. 9049, Missouri, Kansas & Texas Railway Company of Texas, which motion for rehearing was overruled by this court February 2nd, 1916.

[SEAL.] F. T. CONNERLY,
Clerk Supreme Court.

(Endorsed:) Appl. 9049. M. K. & T. Ry. Co. of Texas vs. State of Texas. Certified copy of Motion for rehearing. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin Tex. Feb. 15, 1916. R. H. Connerly, Clerk.

312 February 2nd, 1916.

Mo. No. 3579; App. No. 9049.

MISSOURI, KANSAS & TEXAS RY. CO. OF TEX.

vs.

THE STATE OF TEXAS.

From Travis County, Third Dist.

Motion for Rehearing of App. No. 9049.

Motion overruled.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true copy of the order of court, overruling the motion for rehearing of Application No. 9049, M. K. & T. Ry. Co. of Tex. vs. State of Texas.

Witness my hand and seal of said Court, this the 15th day of February, A. D. 1916.

[SEAL.] F. T. CONNERLY, *Clerk,*
By H. L. CLAMP, *Deputy.*

Mo. No. 3579. App. No. 9049. M. K. & T. Ry. Co. of Tex. vs. State of Texas. Certified copy of order overruling Motion for rehearing of App. No. 9049. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Tex., Feb. 15, 1916. R. H. Connerly, Clerk.

313 *Certified Copy Bill of Costs, Supreme Court.*

Clerk's Office, Supreme Court.

No. 9049.

M., K. & T. Ry. Co. of Texas

vs.

State of Texas.

Filing Application	.50
Docketing Petition	.50
Entering Appearance of Counsel	.50
Filing two Briefs	.60
Filing three Papers	.90
Entering Orders	1.00
Entering Judgment on Application	1.00
Certified Copy of Judgment	1.00
Taxing Cost of Application	.50
Certified Copy Bill of Costs	1.00
Filing and Entering Motion	.55
Copy Opinion (Recording)	4.20
Total	$12.25

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and seal of said court, at Austin, this the 4th day of February, 1916.

[SEAL.] F. T. CONNERLY, *Clerk.*

(Endorsed:) Application No. 9049. Certified copy Bill of Costs. In Supreme Court. Austin. M., K. & T. Ry. Co. of Tex. vs. State of Texas. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Tex. Feb. 4, 1916. R. H. Connerly, Clerk.

314 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS and AMERICAN SURETY COMPANY OF NEW YORK, Plaintiffs in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas:

The petition of the Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York respectfully shows that defendant in error, The State of Texas, filed this suit against the Missouri, Kansas & Texas Railway Company of Texas, hereinafter called plaintiff in error, in the District Court of Travis County, Texas, to recover penalties in the sum of $400,000.00 for eighty alleged violations of an order of the Railroad Commission of Texas, issued February 23, 1907, in the operation of certain of its trains, which order, omitting formal and unnecessary parts, reads as follows:

"Each and every railroad company operating a railroad in this state shall start its passenger trains from the points of origin in accordance with advertised schedule, and said trains, except from unavoidable accidents thereto en route, shall observe and conform to the published schedule as to arrival and departure at the several stations on the line; provided, that trains may be held not to exceed thirty (30) minutes at origin or at junction points with other lines to make connection with trains on such other lines. If at the expiration of said thirty minutes connecting trains are in sight, ten minutes in addition to said thirty minutes will be allowed in which to

315 make the connection. Where connecting trains arrive within the time above allowed a reasonable time, in addition to that provided for, will be allowed for transfer of passengers, mails, express and baggage. Where connections are reliably reported to be more than thirty minutes late, no wait will be made."; that, among other defenses, plaintiff in error urged that the trains involved are instrumentalities of interstate commerce, having been put on and being operated primarily to accommodate interstate traffic and carrying principally interstate passengers, that said trains, as to schedule and operation, are subject to regulation by the Interstate Commerce Commission and not by the Railroad Commission of Texas, that its passenger trains other than these adequately accommodate the local business, that the order can be complied with only by running additional trains, and, therefore, that the order, as applied to said trains, is void because it covers a field of legislation which Congress has occupied, and regulates, burdens and interferes with interstate commerce, in violation of subdivision 3, Section 8, Article 1 of the Con-

stitution of the United States, and takes the property of plaintiff in error without due process of law, contrary to section 1 of the Fourteenth Amendment of the Constitution of the United States; that the district court overruled these defenses and entered its judgment sustaining the order and assessing penalties in the sum of $14,000.00 against plaintiff in error — twenty-eight alleged violations thereof, from which judgment an appeal was taken by plaintiff in error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas; that the American Surety Company of New York was surety on the appeal bond given by plaintiff in error on such appeal; that in said Court of Civil Appeals plaintiff in error again urged its said defenses and its rights under the Constitution and laws of the United States, but the Court of Civil Appeals, on May 13, 1914, overruled said defenses and affirmed the judgment of the district court, thereby committing errors to the prejudice of Petitioners, all of which will appear more in detail from the assignment of errors filed with this petition, and denying to Plaintiff in error the rights, titles, privileges and immunities specially set up and claimed
316 by it under the Constitution and laws of the United States; that a motion for rehearing, filed by Plaintiff in error in said Court of Civil Appeals, in which said defenses, rights, titles, privileges and immunities were again specially set up and claimed by it, was overruled, and the Supreme Court of Texas on January 12, 1916, denied the application of Plaintiff in error for a writ of error, seasonably filed in said cause; and that the said Court of Civil Appeals is the highest court of the State of Texas in which a decision of this action could be had, and the record therein is now with it.

Wherefore, Petitioners pray that a writ of error may be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of the Court of Civil Appeals; that a duly authenticated transcript of the record, proceedings and papers may be sent to the Supreme Court of The United States; and that they have such other and further relief in the premises as may be meet and just, and thus they will ever pray.

CHARLES C. HUFF,
ALEXANDER H. McKNIGHT,
Attorneys for Plaintiffs in Error.

JOSEPH M. BRYSON,
Of Counsel.

The writ of error prayed for in the foregoing petition is hereby allowed, the same to operate as a supersedeas, and the bond for such purpose is fixed at the sum of $30,000.00, this the 4th day of February, A. D. 1916.

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

(Endorsed:) No. 5159. In the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Missouri, Kansas &

Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in error, vs. The State of Texas, Defendant in error. Petition for Writ of error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Feb. 4, 1916. R. H. Connerly, Clerk.

317 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS and AMERICAN SURETY COMPANY OF NEW YORK, Plaintiffs in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

Assignment of Errors.

Now come the Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in error in this cause, and make the following assignment of errors, which they aver the Court of Civil Appeals for the Third Supreme Judicial District of Texas committed in the disposition of the case, as shown by the record and proceedings therein:

1.

The Court of Civil Appeals erred in holding that the order of the Railroad Commission of Texas here in question is valid as applied to trains No. 9 and No. 209 of the Railway Company, because said trains are instrumentalities of interstate commerce and Congress, acting under power conferred upon it by subdivision 3, Section 8, Article 1 of the Constitution of the United States, has so far occupied the field of legislation covered by the order that the State's regulatory power therein has ceased to exist.

2.

The Court of Civil Appeals erred in holding that the order of the Railroad Commission of Texas involved is not, in its application to trains No. 9 and No. 209, of the Railway Company, a regulation of, a burden upon or an interference with interstate commerce, contrary to subdivision 3, Section 8, Article 1 of the Constitution of the United States, and therefore void.

318 3.

The Court of Civil Appeals erred in holding that the said order of the Railroad Commission of Texas does not take the property of the Railway Company without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United

States, because, as applied in this case, it is arbitrary and unreasonable and requires Plaintiff in error to run additional passenger trains for which there is no public necessity.

4.

The Court of Civil Appeals erred in affirming the judgment of the trial court in favor of Defendant in error and in entering judgment against Plaintiffs in error for penalties in the sum of $14,000.00.

Wherefore, Plaintiffs in error pray that the judgment of the said Court of Civil Appeals be reversed, and that such judgment be entered by the Supreme Court of the United States as will grant to them the rights to which they are entitled under the Constitution and laws of the United States.

CHARLES C. HUFF,
ALEXANDER H. McKNIGHT,
Attorneys for Plaintiffs in Error.

JOSEPH M. BRYSON,
Of Counsel.

(Endorsed:) No. 5159. In the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company, of New York, Plaintiffs in Error vs. The State of Texas, Defendant in Error. Assignment of Errors. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Feb. 4, 1916. R. H. Connerly, Clerk.

319 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS and AMERICAN SURETY COMPANY OF NEW YORK, Plaintiffs in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

The above entitled matter coming on to be heard upon the petition of the Plaintiffs in error from the Supreme Court of the United States to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and upon examination and consideration of said petition and the record in said matter, and desiring to give the plaintiffs in error an opportunity to present in the Supreme Court of the United States the questions presented by the Record in said matter,—

It is ordered that a writ of error be and is hereby allowed to this

court from the Supreme Court of the United States and that the bond presented by said petitioners be and the same is hereby approved.

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Done this 4th day of February, A. D. 1916.

(Endorsed:) No. 5159. In the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in Error vs. The State of Texas, Defendant in Error. Order Allowing Writ. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Tex., Feb. 4, 1916. R. H. Connerly, Clerk.

320 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS and AMERICAN SURETY COMPANY OF NEW YORK, Plaintiffs in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Writ of Error Bond.

Know all men by these presents: That we, the Missouri, Kansas & Texas Railway Company of Texas, a corporation, chartered and existing under the laws of the State of Texas, with its principal office in the City of Dallas, Dallas County, Texas, and American Surety Company of New York, a corporation chartered and existing under the laws of the State of New York and having an office and regular place of business in the City of Austin, Travis County, Texas, as principals and the other subscribers hereto as sureties, are held and firmly bound unto the State of Texas, in the sum of Thirty thousand Dollars ($30,000.00) lawful money of the United States of America, to the payment of which well and truly to be made we bind ourselves and successors and assigns, heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed, sealed and dated, this the 3rd day of February, A. D. 1916.

Whereas, in the above entitled cause, the said plaintiffs in error seek to prosecute their writ of error in the Supreme Court of the United States to reverse the judgment rendered in said cause by the Court of Civil Appeals for the Third Supreme Judicial District of Texas in favor of defendant in error, and against plaintiffs in error.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their writ of
321 error to effect and answer all damages and costs that may be

adjudged if they shall fail to make good their plea, then this obligation to be void; otherwise, to remain in full force and effect.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS,
By ALEXANDER H. McKNIGHT, *Its Attorney.*
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By BREWSTER CAMERON, JR.,
Resident Vice-Pres't.

Attest:
W. T. DECHERD,
Res. Ass't Sec'y.
C. C. HUFF,
R. L. PENN.

The above and foregoing bond is approved this the 4th day of February, 1916.

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

(Endorsed:) No. 5159. In the Court of Civil Appeals of the Third Supreme Judicial District of Texas. The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in Error, vs. The State of Texas, Defendant in Error. Writ of Error Bond. Filed in Court of Civil Appeals, 3rd Supreme Judicial District of Tex. Feb. 4, 1916. R. H. Connerly, Clerk.

322 No. 5159.

M., K. & T. RY. CO. OF TEXAS, Appellant,
vs.
THE STATE OF TEXAS.

Appeal from Travis County.

Cost Bill in Court of Civil Appeals, 3rd District, Austin, Texas.

Costs of Supreme Court	12.25
Filing record, 50¢ Docketing cause, 50¢ Appearances, 1.00.	2.00
Filing briefs	1.70
" and entering 2 motions, 70¢, Orders, (7) 3.50	4.20
" 27 extra papers	2.70
4 continuances	.80
2 judgments, 2.00, Taxing costs 50¢, Mandate, 1.50	4.00
Recording opinions 6.00, Copy cost bill, 75¢	6.75
Transcript fee to U. S. Sup. Court	165.00
Copy orders to Tex. Sup. Court	2.00
Notices, (22) $11.00 Copy motion 4.90	15.90
Issuing precept, 1.00, Sheriff's fee, 1.00	2.00
Total	$219.30

323 Clerk's Office, Court of Civil Appeals, Third District, Austin, Texas.

Final Certificate.

I, R. H. Connerly, Clerk of the Court of Civil Appeals, Third Supreme Judicial District of Texas, do hereby certify that the foregoing 322 pages from 0 to and including page 322, contain true and correct copies of all proceedings had in the District Court of Travis County, Texas, the Court of Civil Appeals of the Third Supreme Judicial District of Texas and the Supreme Court of Texas, in the cause in said Court of Civil Appeals numbered 5159, entitled—Missouri, Kansas & Texas Railway Company of Texas, Appellant vs. The State of Texas, Appellee, appealed from the District Court of Travis County Texas, to said Court of Civil Appeals, as shown by the transcripts and documents now on file in my office, and that I have attached thereto the Original Petition for Writ of error, the Original Assignment of errors, the Original Writ of Error and the Original Citation in error from the Supreme Court of the United States of America. I do hereby further certify that there are on file in my office a true and correct copy of the Petition for writ of error, and a true and correct copy of the Assignment of errors and that there have been lodged with me two copies of the Original Writ of error, one — my files and the other for the defendant in error. Witness my hand and the seal of said Court, this the 26th day of February, A. D. 1916.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,
Clerk of the Court of Civil Appeals of the 3rd Supreme Judicial District of Texas.

324 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS and AMERICAN SURETY COMPANY OF NEW YORK, Plaintiffs in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas:

The petition of The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York respectfully shows that Defendant in Error, The State of Texas, filed this suit against The Missouri, Kansas & Texas Railway Company of Texas, hereinafter called Plaintiff in Error, in the District Court of Travis

County, Texas, to recover penalties in the sum of $400,000.00 for eighty alleged violations of an order of the Railroad Commission of Texas, issued February 23, 1907, in the operation of certain of its trains, which order, omitting formal and unnecessary parts, reads as follows:

"Each and every railroad company operating a railroad in this State shall start its passenger trains from the points of origin in accordance with advertised schedule, and said trains, except from unavoidable accidents thereto enroute, shall observe and conform to the published schedule as to arrival and departure at the several stations on the line; provided, that trains may be held not to exceed thirty (30) minutes at origin or at junction points with other lines to make connection with trains on such other lines. If at the
325 expiration of said thirty minutes connecting trains are in sight, ten minutes in addition to said thirty minutes will be allowed in which to make the connection. Where connecting trains arrive within the time above allowed a reasonable time, in addition to that provided for, will be allowed for transfer of passengers, mail, express and baggage. Where connections are reliably reported to be more than thirty minutes late, no wait will be made.";

that, among other defenses, Plaintiff in Error urged that the trains involved are instrumentalities of interstate commerce, having been put on and being operated primarily to accommodate interstate traffic and carrying principally interstate passengers, that said trains, as to schedule and operation, are subject to regulation by the Interstate Commerce Commission and not by the Railroad Commission of Texas, that its passenger trains other than these adequately accommodate the local business, that the order can be complied with only by running additional trains, and, therefore, that the order, as applied to said trains, is void because it covers a field of legislation which Congress has occupied, and regulates, burdens and interferes with interstate commerce, in violation of subdivision 3, Section 8, Article I of the Constitution of the United States, and takes the property of Plaintiff in Error without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States; that the District Court overruled these defenses and entered its judgment sustaining the order and assessing penalties in the sum of $14,000.00 against Plaintiff in Error for twenty-eight alleged violations thereof, from which judgment an appeal was taken by Plaintiff in Error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas; that the American Surety Company of New York was surety on the appeal bond given by Plaintiff in Error on such appeal; that in said Court of Civil Appeals Plaintiff in Error again urged its said defenses
326 and its rights under the Constitution and Laws of the United States, but the Court of Civil Appeals, on May 13, 1914, overruled said defenses and affirmed the judgment of the District Court, thereby committing errors to the prejudice of Petitioners, all of which will appear more in detail from the assignment of errors filed with this petition, and denying to Plaintiff in Error the rights,

titles, privileges and immunities specially set up and claimed by it under the Constitution and Laws of the United States; that a motion for rehearing, filed by Plaintiff in Error in said Court of Civil Appeals, in which said defenses, rights, titles, privileges and immunities were again specially set up and claimed by it, was overruled, and the Supreme Court of Texas on January 12, 1916, denied the application of Plaintiff in Error for a writ of error, seasonably filed in said cause; and that the said Court of Civil Appeals is the highest court of the State of Texas in which a decision of this action could be had, and the record therein is now with it.

Wherefore, Petitioners pray that a writ of error may be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of the Court of Civil Appeals; that a duly authenticated transcript of the record, proceedings and papers may be sent to the Supreme Court of the United States; and that they have such other and further relief in the premises as may be meet and just, and thus they will ever pray.

CHARLES C. HUFF,
ALEXANDER H. McKNIGHT,
Attorneys for Plaintiffs in Error.

JOSEPH M. BRYSON, *Of Counsel.*

327 The writ of error prayed for in the foregoing petition is hereby allowed, the same to operate as a supersedeas, and the bond for such purpose is fixed at the sum of $30,000.00, this the 4th day of February, A. D. 1916.

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

328 [Endorsed:] No. 5159. In the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in Error, vs. The State of Texas, Defendant in Error. Petition for Writ of Error. Filed in Court of Civil Appeals 3d Supreme Judicial District, Austin, Tex. Feb. 4, 1916. R. H. Connerly, Clerk.

329 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

No. 5159.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS and AMERICAN SURETY COMPANY OF NEW YORK, Plaintiffs in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Assignment of Errors.

Now come The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in

Error in this cause, and make the following assignment of errors, which they aver the Court of Civil Appeals for the Third Supreme Judicial District of Texas committed in the disposition of the case, as shown by the record and proceedings therein:

1.

The Court of Civil Appeals erred in holding that the order of the Railroad Commission of Texas here in question is valid as applied to trains No. 9 and No. 209 of the Railway Company, because said trains are instrumentalities of interstate commerce and Congress, acting under power conferred upon it by subdivision 3, Section 8, Article I of the Constitution of the United States, has so far occupied the field of legislation covered by the order that the State's regulatory power therein has ceased to exist.

330 2.

The Court of Civil Appeals erred in holding that the order of the Railroad Commission of Texas involved is not, in its application to trains No. 9 and No. 209 of the Railway Company, a regulation of, a burden upon or an interference with interstate commerce, contrary to subdivision 3, Section 8, Article I of the Constitution of the United States, and therefore void.

3.

The Court of Civil Appeals erred in holding that the said order of the Railroad Commission of Texas does not take the property of the Railway Company without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, because, as applied in this case, it is arbitrary and unreasonable and requires Plaintiff in Error to run additional passenger trains for which there is no public necessity.

4.

The Court of Civil Appeals erred in affirming the judgment of the trial court in favor of Defendant in Error and in entering judgment against Plaintiffs in Error for penalties in the sum of $14,000.00.

Wherefore, Plaintiffs in Error pray that the judgment of the said Court of Civil Appeals be reversed, and that such judgment be entered by the Supreme Court of the United States as will grant to them the rights to which they are entitled under the Constitution and Laws of the United States.

CHARLES C. HUFF,
ALEXANDER H. McKNIGHT,
Attorneys for Plaintiffs in Error.

JOSEPH M. BRYSON,
Of Counsel.

331 [Endorsed:] No. 5159. In the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in Error, vs. The State of Texas, Defendant in Error. Assignment of Errors. Filed in Court of Civil Appeals, 3d Supreme Judicial District. Austin, Tex., Feb. 4, 1916. R. H. Connerly, Clerk.

332 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said Court of Civil Appeals for the Third Supreme Judicial District of Texas, before you, or some of you, on the 13th day of May, 1914, being the highest court of law or equity of the said State of Texas in which a decision could be had in said suit between The Missouri, Kansas & Texas Railway Company of Texas, appellant, vs. The State of Texas, appellee, wherein titles, rights, privileges and immunities are claimed under the constitution and statutes of the United States and under authority exercised under the United States, and the decision was against the titles, rights, privileges and immunities specially set up and claimed by The Missouri, Kansas & Texas Railway Company of Texas under such constitution, statutes and authority, a manifest error hath happened to the great damage of the said The Missouri, Kansas & Texas Railway Company of Texas and of the American Surety Company of New York, surety on the supersedeas bond of said Railway Company in its appeal from the judgment of the District Court of Travis County, Texas, to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, as by their complaint appears; we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

333 things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the aforesaid Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this the 4th day of February, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

[The Seal of the U. S. District Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the District Court of the United States in and for the Western District of Texas.

Allowed as a supersedeas by

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

334 [Endorsed:] No. 5159. In the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in Error, vs. The State of Texas, Defendant in Error. Writ of Error. Filed in Court of Civil Appeals, 3d Supreme Judicial District, Austin, Tex., Feb. 4, 1916. R. H. Connerly, Clerk.

335 UNITED STATES OF AMERICA:

The President of the United States to the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, wherein The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York are Plaintiffs in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable W. M. Key, Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, this the 4th day of February, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

W. M. KEY,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Due service of a copy of the above citation is hereby acknowledged and admitted, this the 4th day of February, A. D. 1916.

B. F. LOONEY, *Att'y Gen.;*
LUTHER NICKELS, *Ass't Att'y Gen.,*
Attorneys for Defendant in Error,
The State of Texas.

Attest:

[The Seal of the U. S. District Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk U. S. District Court,
Western District of Texas.

336 [Endorsed:] No. 5159. In the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Missouri, Kansas & Texas Railway Company of Texas and American Surety Company of New York, Plaintiffs in Error, vs. The State of Texas, Defendant in Error. Citation in Error. Filed in Court of Civil Appeals, 3d Supreme Judicial District, Austin, Tex., Feb. 4, 1916. R. H. Connerly, Clerk.

Endorsed on cover: File No. 25,164. Texas Court of Civil Appeals, 3d Supreme Judicial District. Term No. 398. The Missouri, Kansas & Texas Railway Company, plaintiff in error, vs. The State of Texas. Filed March 3d, 1916. File No. 25,164.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 112.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS,
Plaintiff in Error,

vs.

THE STATE OF TEXAS,
Defendant in Error.

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES C. HUFF,
ALEXANDER H. McKNIGHT,
C. S. BERG,
Attorneys for Plaintiff in Error.

JOSEPH H. BRITTON,
ALEX. BRITTON,
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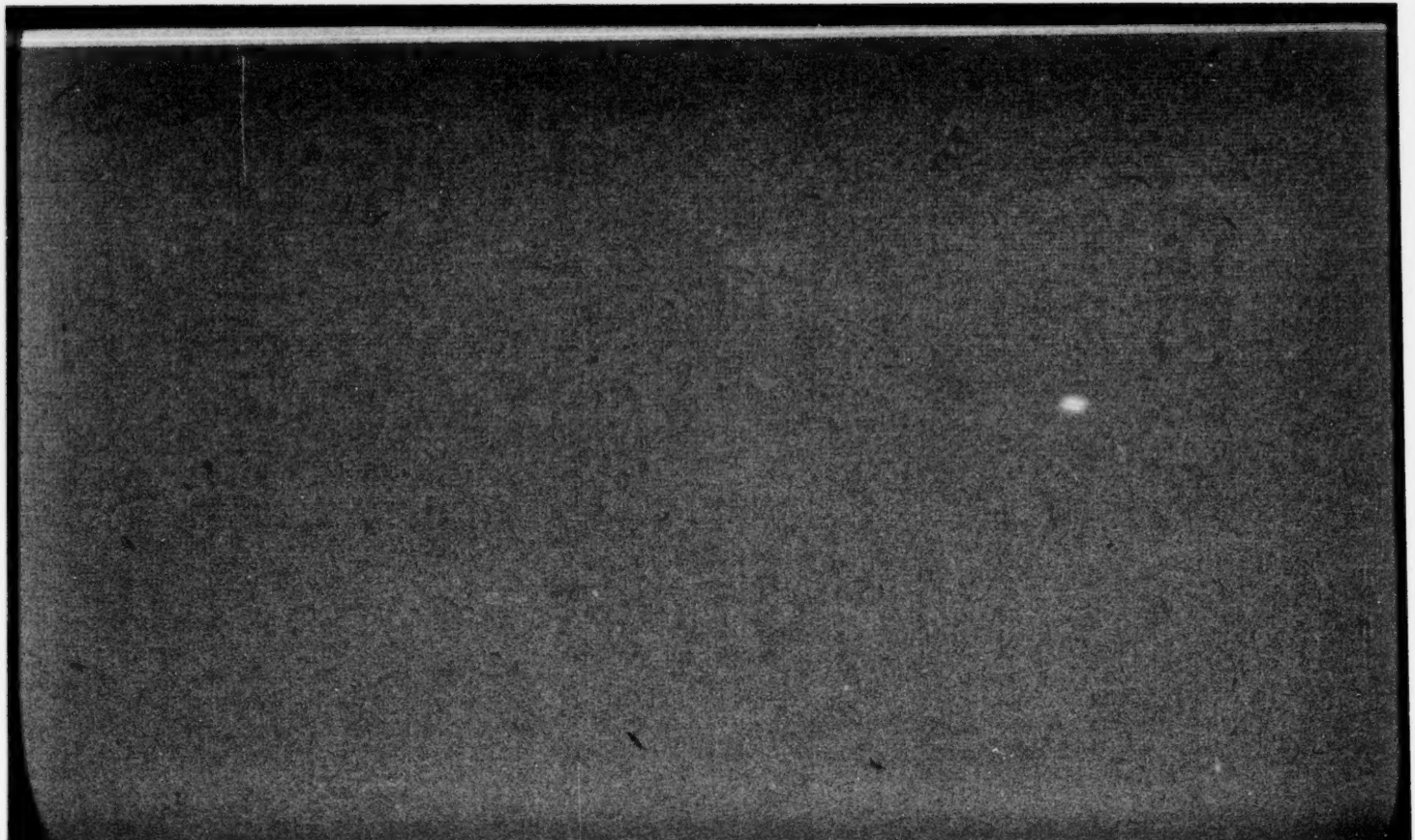

SUBJECT INDEX OF CONTENTS.

Page

Statement 1-23

(a) Excerpt from Railroad Commission's order 2

(b) Grounds of defense urged by defendant... 2-4

(c) Quotation from opinion of Court of Civil Appeals 5-8

(d) Excerpt from opinion of Court of Civil Appeals on plaintiff's motion for rehearing 9-11

(e) Supreme Court of Texas refused defendant's application for a writ of error to the Texas Court of Civil Appeals..... 12

(f) Excerpt from the Supreme Court's opinion 12-17

Abstract of testimony..... 23-34

Assignment of errors..... 35-36

Argument 37-64

I. The order of the Railroad Commission of Texas regulates, burdens and interferes with interstate commerce..... 37-57

II. The order of the Railroad Commission of Texas is void under the due-process-of-law clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States..... 57-64

Cases Cited.

American Express Co. v. South Dakota, 37 Sup. Ct. Rep. 565..... 54
Atlantic Coast Line v. Wharton, 207 U. S. 328... 38
Central of Georgia Ry. Co. v. Murphey, 196 U. S. 194 45-55
C., B. & Q. Ry. Co. v. Railroad Commission of Wisconsin, 237 U. S. 220.....38-40-41
Chicago, M. & St. P. R. R. v. Wisconsin, 238 U. S. 501 64
Cleveland, Etc., Ry. Co. v. Illinois, 177 U. S. 514.. 38
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79..... 55
Council Bluffs v. Kansas City, St. J. & C. B. R. Co., 45 Iowa 338..... 53
G. C. & S. F. R. R. Co. v. Mayes, 201 U. S. 321.. 44
Gladson v. Minnesota, 166 U. S. 427..... 38
Great Northern Ry. Co. v. Minnesota, 238 U. S. 340 58-59-60
Herndon v. C., R. I. & P. Ry. Co., 218 U. S. 156 38-39-55
Houston East & West Texas Ry. Co. v. United States, 234 U. S. 342..... 53
H. & T. C. R. R. Co. v. Mayes, 201 U. S. 321..... 44
Illinois Central R. R. Co. v. Illinois, 163 U. S. 142 38-39

Kansas City Southern Ry. Co. v. Kaw Valley Drainage District, 233 U. S. 75, 79.....55-56
Lake Shore, Etc., Ry. Co. v. Ohio, 173 U. S. 285.. 38
McNeill v. Southern Ry. Co., 202 U. S. 543..... 45
Minnesota Rate Cases, 230 U. S. 352..... 48
Mississippi Railroad Commission v. Illinois Central R. R. Co., 203 U. S. 335..... 38
Mississippi Railroad Commission *et al.* v. M. & O. R. R. Co., 37 Sup. Ct. Rep. 602.....58-59
Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262 54
Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S. 510 58-59-63
Railroad Commission of Texas v. Galveston, Harrisburg & San Antonio Ry. Co., 112 S. W. 345.. 61
Rowland, J. Sam, *et al.*, v. Sidney E. Boyle *et al.*, 37 Sup. Ct. Rep. 577.....53-54
Seaboard Air Line Ry. Co. v. Elizabeth Blackwell, 37 Sup. Ct. Rep. 640..... 45
Section 10058, United States Compiled Statutes, 1916 (Vol. X, page 12322).....52-53
So. Covington & Cincinnati Street Ry. Co. v. City of Covington, 235 U. S. 537.....45-46-47-48-49-50
Southern Ry. Co. v. Reid, 222 U. S. 424..... 45
Southern Ry. Co. v. Reid & Beam, 222 U. S. 444.. 45
The Saint Louis, 48 Fed. 312..... 53
Union Pac. R. R. v. C., R. I. & P. Ry., 51 Fed. 309, 163 U. S. 564..... 53
Yick Wo v. Hopkins, 118 U. S. 356..... 55

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 113.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS,
Plaintiff in Error,

vs.

THE STATE OF TEXAS,
Defendant in Error.

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This suit was brought by the State of Texas, hereinafter called plaintiff, to recover from The Missouri, Kansas & Texas Railway Company of Texas, hereinafter called defendant, penalties in the sum of $400,000.00 for eighty alleged violations by defendant in the operation of its passenger trains num-

bered 9 and 209 of an order of the Railroad Commission of Texas promulgated February 23, 1907, and amended January 3, 1908, which order, as amended, omitting formal and unnecessary parts, reads as follows:

"Each and every railroad company operating a railroad in this State shall **start its passenger trains from the points of origin in accordance with advertised schedule,** and said trains, except from unavoidable accidents thereto en route, shall observe and conform to the published schedule as to arrival and departure at the several stations on the line; **provided, that trains may be held not to exceed thirty (30) minutes at origin or at junction points with other lines to make connection with trains on such other lines. If, at the expiration of said thirty minutes, connecting trains are in sight, ten minutes, in addition to said thirty minutes,** will be allowed in which to make the connection. Where connecting trains arrive within the time above allowed, a reasonable time, in addition to that above provided for, will be allowed for transfer of passengers, mail, express and baggage. **Where connections are reliably reported to be more than thirty minutes late, no wait will be made"** (Rec., pp. 1-18).

The following grounds of defense, among others, were urged by defendant:

(1) It averred that it is a common carrier en-

gaged in interstate commerce; that it is subject to the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto; that in connection with Missouri, Kansas & Texas Railway Company, a Kansas corporation, it operates a through passenger route from San Antonio, Texas, on the south, to Kansas City and St. Louis, Missouri, on the north; that for the purpose of handling interstate business over such through route the two companies placed in operation the two trains numbered 9 and 209 involved in the suit; that the lines of the two companies connect at Red River, about five miles north of Denison, Texas, but the same equipment and crews are used on both; that the said trains 9 and 209 are operated primarily to accommodate interstate business; that they are therefore instrumentalities of interstate commerce, and that the said order of the Railroad Commission of Texas, frequently referred to in the record as Passenger Circular No. 18, as applied to these trains, is void, because a regulation of, a burden upon, and an interference with, interstate commerce, in violation of Subdivision 3, Section 8, Article I of the Constitution of the United States (Rec., pp. 20-22).

(2) It also averred that it furnished adequate accommodations for its intrastate business in trains other than 9 and 209, and, therefore, could not be re-

quired to run additional trains, which the order would compel it to do, and that for this reason the order takes its property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States (Rec., pp. 22-23).

Both of these defenses were overruled by the trial court, which sustained the order, held it applicable to trains 9 and 209, and found that defendant had violated it twenty-eight times in the operation of said trains; and judgment was entered in favor of plaintiff for $14,000.00 (Rec., pp. 24, 35-37).

In making the order the Commission acted under Article 6552 of the Revised Civil Statutes (1911) of Texas, which reads:

> "Every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time thereto, offer, or be offered for transportation at the place of starting and at junctions with other roads, and at sidings and at stopping places established for receiving and discharging way passengers and freights, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of the

railroad companies to comply with the requirements of this article shall be deemed an abuse of their rights and privileges and subject to regulation and correction by the Railroad Commission."

Defendant insisted in the state courts that this statute does not authorize the order in question, and that, in any event, there had been only a single violation of the order, and therefore only one penalty could be recovered; but those questions are now foreclosed by the rulings against it.

The Court of Civil Appeals for the Third District of Texas, upon an appeal by defendant, first reversed the judgment of the trial court, and rendered judgment for defendant (Rec., pp. 116-120). In the course of its opinion, it said (Rec., pp. 118-120):

"By its proposition under its several assignments, appellant insists that a through passenger train, operated by two railway companies under an agreement, between points in different states, is an instrumentality and facility of carriage within the meaning of the act to regulate commerce, the jurisdiction to regulate and control which lies with the Interstate Commerce Commission, and not with the Railroad Commission of Texas. We agree with this contention, and hold that since it clearly appears from the record that the trains involved in this contention were engaged in interstate commerce at the times in question, the order of the commission was not

applicable to them, and sustain appellant's several assignments raising this question. See Interstate Commerce Act, Secs. 1 and 15, as amended (Act Feb. 4, 1887, c. 104, 24 Stat. 379, 384 [U. S. Comp. St. 1901, pp. 3154, 3165] as amended by Act June 29, 1906, c. 3591, Secs. 1, 4, 34 Stat. 584, 589 [U. S. Comp. St. Supp. 1911, pp. 1284, 1297]); 1 Drinker; Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; B. & O. R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; Southern Railway Co. v. Reid, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; Southern Railway Company v. Reed & Beam, 222 U. S. 444, 32 Sup. Ct. 145, 56 L. Ed. 263; 2 Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, decided January 6, 1913; C., B. & Q. Ry. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323, decided January 6, 1913; C., R. I. & P. Ry. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203, decided January 6, 1914; also, United States v. Union Stock Yards & Transit Co., and Chicago Junction Railway Co. v. United States, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226, decided January 15, 1913.

"Appellant likewise contends by its several propositions that, where a railroad company has already provided ample facilities for the adequate accommodation of the traveling public, such as may be proper and reasonable at any

given point, and operates, in addition thereto, through trains for the accommodation of interstate passengers, an act of the State Legislature or Railroad Commission affecting the operation of said through trains is a burden upon and an interference with interstate commerce, and this contention seems to be supported by the authorities (see Herndon v. C., R. I. & P. Ry. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; Atlantic Coast Line v. Wharton, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; Mississippi Railroad Commission v. Illinois Central R. R., 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; Big Four v. Illinois, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868; L. S. & M. S. Railway Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064; Illinois Central R. R. Co. v. Illinois, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107).

"The uncontradicted evidence, we think, amply sustains appellant's contention that during the period in controversy it furnished ample facilities, independent of said through trains, for the accommodation of its passenger traffic on its lines south of Denison, in that it had three passenger trains each way daily between Denison and Hillsboro and Granger, and two passenger trains each way daily between Granger and San Antonio, in addition to said trains Nos. 9 and 209, or a total of four trains daily each way between Denison and Granger, and three trains each way daily between Granger and San Antonio; two of the additional trains between Denison and Granger stopping each way daily at all regu-

lar stations, and one of them between Granger and San Antonio.

"The chief complaint on the part of appellee was that appellant failed to run said trains Nos. 9 and 209 out of Denison on schedule time. It will be observed that the order of the Commission only requires railroad companies operating in this state to start their passenger trains from the points of origin in accordance with their advertised schedules. **Can it be said that Denison was the point of origin of said trains above referred to? We think not. These trains, it clearly appears from the evidence, were made up and started from Kansas City and St. Louis, respectively, and thence operated and delivered to appellant by said Missouri, Kansas & Texas Railway Company at Denison, from which point appellant forwarded them, as through trains, under contract, over its lines, so that we think it must be regarded as one continuous train, with its point of origin at Kansas City and St. Louis, and that appellant was merely forwarding same upon its arrival at Denison, in accordance with and by virtue of its contract and that the failure of said trains to arrive and depart from Denison in accordance with schedule time was not a violation either of the letter or spirit of said order No. 18.**"

But upon plaintiff's motion for a rehearing this decree was set aside, and the judgment of the trial court affirmed (Rec., pp. 142-145). In the opinion on the motion for rehearing the Court said (Rec., pp. 143-144):

"Among other reasons so assigned is that the Court erred in holding that the order of the Commission discussed in the original opinion was void, and not enforceable, because the trains in question originated in St. Louis and Kansas City, and not at Denison, Texas, and hence were instrumentalities of interstate commerce, and could not be regulated and controlled by the Railroad Commission of Texas. After a careful consideration of the matter, we are impressed with the correctness of appellee's contention. It is true that original train No. 9 was made up of two separate and distinct trains, one operated out of St. Louis and the other out of Kansas City by the Missouri, Kansas & Texas Railway Company to Parsons, Kansas, where they were consolidated and run to Denison, Texas, and delivered by said company to appellant; yet at this point the control and authority of the first company ceased, and, in a sense, the identity of the train was lost, and the control of the latter company commenced, because here parts of said train, with other equipment added, were operated by appellant with separate and distinct crews and engines to Hillsboro, Texas, one as No. 9, via Dallas to said point, and the other as No. 209, via Fort Worth, where some of the cars composing the train were dropped out. At Hillsboro they were reunited and operated to Granger as No. 9, where they were again divided, and thereafter operated by appellant as separate and distinct trains; one part thereof going to Houston and the other to San Antonio, via Austin. They were advertised and known as appellant's trains

and were scheduled by it each to leave Denison daily at 6:25 a. m. For which reasons we think, so far as appellant is concerned, said trains Nos. 9 and 209 must be regarded as originating at Denison, Texas. Besides this, under the Constitution and laws of this state, Denison must be regarded as the beginning or starting point of said trains. Appellant had no right to operate its trains beyond the state line, and therefore trains received at the line and operated by it through the state must be regarded as commencing at such point (see Railroad Commission v. C., R. I. & G. Ry. Co., 102 Tex. 397, 117 S. W. 794). Section 1, Article X, of the Constitution of this state provides that:

"'Any railroad corporation or association, organized under the law for the purpose, shall have the right to construct and operate a railroad between any points within this state, and to connect at the state line with railroads of other states.'

"The statute under which appellant is incorporated only authorized it to operate between named points within this state. See R. S. 1911, Art. 6408. In Railroad Commission v. C. R. I. & G. Ry. Co., *supra*, it is said:

"'The state line is, in law and in fact, one terminus of the line of a railroad intersecting it constructed by a Texas corporation, because its powers cease at that line.'

"It is true, as contended by appellant, that such trains were operated under a contract between it and the Missouri, Kansas & Texas Railway Company, whereby it was required to re-

ceive original train No. 9 from said last-named company at the state line and operate it over its lines of railway to San Antonio, its point of destination in Texas, in consideration that the Missouri, Kansas & Texas Railway Company would likewise receive from appellant trains Nos. 10 and 210 at such point and operate them over its respective lines to a named destination beyond the state; by reason of which it is, in effect, contended by appellant that, notwithstanding the fact that it was operated as two distinct trains, known as 9 and 209, south from Denison, it should be regarded as originating in Kansas City and St. Louis, instead of at Denison, and thence operated jointly by said two companies as a through train to its point of destination, constituting it a through train, and thereby relieving it from the control of the Railroad Commission. Even though it was being operated under and by virtue of said contract, still we are not disposed to think that this would have the effect to change the beginning or initial point, so far as appellant is concerned, to a point outside of the State of Texas; especially in view of the fact that the law, as we have seen, does not permit appellant to extend its lines beyond the state, but confines its operation to points within the same.

"We therefore hold that such train must be regarded as having originated at Denison, Texas, where appellant took charge of it, operating it as separate and distinct trains from said point to destination over its lines in accordance with its contract."

The Supreme Court of Texas refused defendant's application for a writ of error to the Texas Court of Civil Appeals (Rec., p. 190) and as a consequence its judgment became the final judgment of the highest Texas Court to which the case could be taken (West. Union Tel. Co. v. Crovo, 220 U. S. 364; St. Louis, S. F. & T. Ry. Co. v. Seale, 229 U. S. 156). The Supreme Court of Texas stated briefly its reasons for refusing to grant a writ of error, which are set forth in the following excerpts from its opinion (Rec., pp. 191-193):

(a)

> "The trains were through passenger trains from St. Louis and Kansas City, Mo., to points in Texas, operated by the Missouri, Kansas & Texas Railway Company to Denison, Texas, and from there to destination by the plaintiff in error under a contract with that company; and it appears from the proof that a considerable portion of their passenger traffic was interstate.
>
> "Because the trains were operated by the plaintiff in error altogether in Texas, and, as held, its want of authority as a corporation chartered in Texas to operate them beyond the state line, the Honorable Court of Civil Appeals concluded in its opinion on rehearing that they were to be treated as purely intrastate trains, and upon that ground rested its decision. But under the proof that the traffic of the trains was largely interstate, we think they must be re-

garded in the case as instrumentalities of interstate commerce. Being employed in the movement of such traffic, it is difficult to perceive how they can be differently regarded, and we shall so treat them.

"There is accordingly presented the simple question as to the power of the Railroad Commission to provide and enforce a regulation of this character as applied to trains employed in interstate commerce by railway companies operating in this state. While by the Federal Constitution, Congress is empowered to regulate commerce with foreign nations and among the several states, there remains in the states the power, distinct from any granted to the Federal Government, to prescribe, within constitutional limitations, relative rights and duties of persons and corporations within their jurisdiction in the interest of the public convenience and for the public good. It is a power still valid and effectual, though its exercise may relate to subjects over which Congress possesses, but has not exerted, authority.

(b)

It can not be supposed that a sovereign state in the grant of the rights and privileges accorded by its laws to railway carriers is required to wholly surrender its authority over them simply because they may engage in interstate commerce. Nor is it to be assumed that such rights and privileges are extended merely for their benefit as interstate carriers, or

only to subserve the interest of those making use of them for that character of traffic. There are certain duties whose performance by common carriers in the state the police power of the state may exact, notwithstanding their employment in interstate commerce; and that power is not nullified by the mere fact that they are so employed. Its valid exercise in relation to carriers engaged in such commerce, as well as their instrumentalities so used, is dependent upon other considerations; and the principles which in the particular case determine the question are well established.

"The Supreme Court of the United States, which is invested with the ultimate authority of determining these questions, recognize three classes of cases respecting the power of the State over the subject of commerce. To use the language of one of its opinions, they are: (1) Those in which the power of the State is exclusive; (2) those in which the states may act in the absence of legislation by Congress; (3) those in which the action of Congress is exclusive, and the State can not interfere at all. In relation to cases of the second class, it is the exercise by Congress of its power to regulate commerce, and not the mere existence of such power in Congress, which renders inconsistent the exercise of the same power by the State; and the State is free to exert its power where Congress has not acted. If the subject of the particular state enactment is national in its character, the absence of legislation by Congress amounts to an indication of its will that, as affected by such subject, commerce shall be left untrammeled, and

the state regulation is of no effect. But it is equally true that an enactment of the State may be valid though it incidentally affects interstate commerce. The authority the State to enact legislation which is in aid of such commerce, as distinguished from that which burdens or interferes with it, is likewise recognized. These are the principles of law which govern the present question, as clearly recognized and plainly declared in repeated adjudications of the United States Supreme Court upon the subject (Covington, Etc., Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; Western Union Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; New York, New Haven & Hartford Railroad Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; Lake Shore & Michigan Southern Railway Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064).

"Applying them in the present case for the purpose of determining the validity of the Railroad Commission's order in its relation to interstate trains, what is the result? It is clear, we think, that in its legislation with respect to interstate commerce Congress has not dealt with the subject matter of the order. With the order producing no conflict with any expression by Congress of its power over the subject, is the State, through its administrative agency established for the regulation of railroads operating within its limits, yet powerless to require their

maintenance of the schedules of such of their trains as may have an interstate character, leaving those trains altogether free from any proper regulation of that nature? We do not think its authority is to be considered as so reduced. The order is very plainly not directed against interstate commerce. It is not an attempt to regulate commerce. It has to do merely with the manner of the operation of trains. It has no further object than to bring about dispatch and certainty in their operation as essentials of efficient service to the public. And it seeks to do no more than require that kind of operation merely within the limits of the State. The effect of its observance upon commerce, whether domestic or interstate, is purely incidental, since as a consequence of its obedience commerce will be affected as the result of only the ordinary operation of trains upon their schedule time. It is no more of a regulation of commerce, and in particular is it no more of a burden upon or interference with commerce in its effect than familiar enactments requiring competency of train operatives as a means of affording safety to passengers and co-employes. It will hardly be denied that, in the absence of action by Congress, the police power of the State may be validly exercised to promote the safe carriage of passengers upon interstate trains (New York, New Haven & Hartford Railroad v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853). If so, by what authority is the State, under a similar condition, to be deprived of the exercise of its rightful powers for the furtherance of their prompt carriage by such trains?

> "So far as it may affect interstate commerce, the order is a regulation in aid of commerce. It is difficult to conclude that a requirement whose natural effect upon commerce is to facilitate its prompt movement through the observance of train schedules and connections constitutes an interference with commerce, or in any just sense a burden upon it. There being no legislation by Congress which renders inconsistent such action by the State, the order of the Railroad Commission in such bearing as it has upon interstate commerce is accordingly a regulation which the State had the full authority to provide in the exercise of its sovereign powers, under which its right to reasonably prescribe the duties of railway companies within its limits is clear and undoubted."

In the opinion of the Texas Court of Civil Appeals, as well as in the opinion of the Supreme Court denying a writ of error, both courts found that the Missouri, Kansas & Texas Railway Company (the Kansas corporation) operated these trains to Denison, Texas, when, as a matter of fact, the agreed statement of facts shows that the line of the Missouri, Kansas & Texas Railway Company ended at the Oklahoma-Texas boundary line on the Red River bridge five miles north of Denison, and that these trains, from that point, became and were the trains of The Missouri, Kansas & Texas Railway Company of Texas, the defendant, and, while operated by the same crews, the

crews became and were the crews and employes of the defendant company. Not only does the record show this to be the fact, but, under the laws of the State of Texas, the Missouri, Kansas & Texas Railway Company (the Kansas corporation) was expressly prohibited from operating its trains from the Red River to Denison, as clearly appears from the opinion of the Texas Court of Civil Appeals. While, by the opinion of the Texas Court of Civil Appeals, the order was applied to these particular trains and the defendant company penalized for not observing the order in respect thereto, it is clear that the order was not meant to apply and could not possibly be applied to these particular trains. There was no advertised **scheduled time** for the arrival or departure of these trains at the junction point of the connecting lines on the Red River bridge. How could the defendant company start these trains from the Red River bridge until they arrived there, or how could it violate the order by holding the trains longer than provided by this order when the trains were not in its possession? The defendant company could not start the train if it was not there to start and it could not hold the train in violation of the order if it was not there to hold. But, however this may be, the defendant company has been penalized under this order for its failure to start a train which was not there, or for

holding a train longer than provided by the order, which was not there, or for not making up or running a substitute train, although the order says nothing about running special or substitute trains.

Regardless of whether the point of origin of these trains, so far as the defendant company is concerned, was the State boundary five miles north of Denison, or at Denison, the trains were still interstate trains and instrumentalities of interstate commerce, and the law applicable must be the same whether the Missouri, Kansas & Texas Railway Company hauled the trains through to Denison and there delivered to the defendant company, or whether the deliveries were made as between the companies at the boundary line five miles north of Denison, where the physical properties of the two companies actually connect.

In the original opinion of the Court of Civil Appeals that Court held

> "that since it clearly appears from the record that the trains involved in this contention were engaged in interstate commerce at the time in question, the order of the Commission was not applicable to them,"

yet, upon petition for rehearing, the Court of Civil Appeals reached a different conclusion for the sole and single reason that, on the arrival of these through, interstate trains at Denison, they were remade and run as two sections, one by way of Dallas as No. 9,

and the other by way of Fort Worth as No. 209, and were again reunited at Hillsboro and run as No. 9 to Granger, where the trains were again subdivided and the section which ran on through to San Antonio was known as No. 9. All these trains and sections of trains were known through from St. Louis and Kansas City to San Antonio and other Texas points as "Katy Limited". That Court said:

> "It is true that the original train No. 9 was made up of two separate and distinct trains, one operated out of St. Louis and the other out of Kansas City, by the Missouri, Kansas & Texas Railway Company, to Parsons, Kansas, where they were consolidated and run to Denison, Texas, and delivered to said company by appellant, yet, at this point the control and authority of the first company ceased (this finding is contrary to the agreed statement of facts) and, in a sense, the identity of the train was lost and the control of the latter company commenced, because here parts of said train, with other equipment added, were operated by appellant with separate and distinct crews and engines to Hillsboro, Texas, one as No. 9 via Dallas to said point, and the other as No. 209 via Fort Worth, where some of the cars composing the train were dropped out. At Hillsboro they were reunited and operated to Granger as No. 9," etc.

The Supreme Court of Texas, in denying the defendant company's application for a writ of error to

the Texas Court of Civil Appeals, however, reached an entirely different conclusion and, while permitting the judgment of the Court of Appeals to stand, expressly ruled that, notwithstanding the trains were broken up and remade at Denison, they were still interstate trains and instrumentalities of interstate commerce, and sustained the judgment of the Court of Civil Appeals solely on the ground that, in the absence of federal regulations, the order of the Railroad Commission of Texas was a **reasonable regulation in aid** of interstate commerce, as shown by the following brief extract from its opinion, denying the writ of error:

> "The trains were through passenger trains from St. Louis and Kansas City, Mo., to points in Texas, operated by the Missouri, Kansas & Texas Railway Company to Denison (contrary to agreed statement of facts), Texas, and from there to destination by the plaintiff in error under a contract with that company, and it appears from the proof that a considerable portion of their passenger traffic was interstate.
>
> "Because the trains were operated by the plaintiff in error altogether in Texas, and, as held, its want of authority as a corporation chartered in Texas to operate them beyond the State line, the Honorable Court of Civil Appeals concluded in its opinion on rehearing that they were to be treated as purely intrastate trains and upon that ground rested its decision. But under the proof that the traffic of the trains was largely in-

terstate, we think they must be regarded in the case as instrumentalities of interstate commerce. Being employed in the movement of such traffic, it is difficult to perceive how they can be differently regarded, and we shall so treat them.

"There is accordingly presented the simple question as to the power of the railroad commission to provide and enforce a regulation of this character as applied to trains employed in interstate commerce by railway companies operating in this State. While, by the Federal Constitution, Congress is empowered to regulate commerce with foreign nations and among the several states, there remains in the states the power, distinct from any granted to the Federal Government, to prescribe, within constitutional limitations, relative rights and duties of persons and corporations within their jurisdiction in the interest of the public convenience and for the public good. It is a power still valid and effectual, though its exercise may relate to subjects over which Congress possesses, but has not exerted, authority."

ABSTRACT OF TESTIMONY.

Upon the trial of the case, attorneys for plaintiff and defendant entered into an agreement as to certain facts, of which paragraph 5 reads as follows:

> "That the railroad of defendant connects with the railroad of Missouri, Kansas & Texas Railway Company at the Texas-Oklahoma state line, about five miles north of Denison, Grayson County, Texas, which point of connection, for convenience, will hereinafter be called Red River. That by an agreement between defendant and said Missouri, Kansas & Texas Railway Company, certain trains, among others, the train called by them No. 9, are operated from the north to Denison and are interchanged between the two at Red River, but there is no change in either crew or equipment at Red River, the trains between Red River and Denison consisting of the same equipment and being operated by the same crews of which they consist and by which they are operated upon the railroad of Missouri, Kansas & Texas Railway Company to Red River; that said train No. 9, operated over the lines of both companies, which, for convenience will hereinafter be called No. 9, from the north, originates in two sections, one at St. Louis and the other at Kansas City, and both of said sections are run over the tracks of the Missouri, Kansas & Texas Railway Company to Parsons, Kansas, where they are consolidated into one train, which runs south over its tracks to Red River, from which point to Denison it is operated over the tracks

of defendant. While said train and the crew operating the same are in Oklahoma they are under the jurisdiction and control of the Missouri, Kansas & Texas Railway Company, and while in in Texas they are under the jurisdiction ond control of the defendant. That train No. 9 from the north was usually composed of about ten cars, some of which, when the train reached Denison, were placed in defendant's train No. 9 and carried south via Dallas to Hillsboro, the remainder being placed in defendant's train No. 209 at Denison and run south via Fort Worth to Hillsboro, at which last-named place the cars so operated via Dallas and via Fort Worth were again combined into a single train, which was operated over defendant's line to and through the City of Austin. Defendant's train No. 209 usually carried about three of the cars contained in No. 9 from the north, and the remainder of the cars in No. 9 from the north were usually placed in defendant's train No. 9. Other cars were picked up at Denison and made a part of defendant's trains Nos. 9 and 209 from time to time as necessary. Two of the sleepers contained in No. 9 from the north were usually operated via Fort Worth and the remaining three via Dallas. Train No. 209 usually carried about six cars from Denison to Hillsboro, a distance of 151 miles, and Train No. 9 usually carried about seven cars from Denison to Hillsboro, a distance of 172 miles, one or two of which, however, were generally set out at Dallas. From Hillsboro to Granger, a distance of 95 miles, defendant's train No. 9 usually consisted of nine cars, and from

Granger to Austin, a distance of 47 miles, of seven cars. The cars set out at Granger were carried to Houston and returned, being picked up at Granger again on north-bound trips. The equipment of No. 9 from the north usually consisted of two mail, baggage and express cars, three passenger coaches and five sleepers; of defendant's train No. 209, of two mail, baggage and express cars, two passenger coaches and two sleepers; of defendant's train No. 9 between Denison and Hillsboro, of two mail, baggage and express cars, two passenger coaches and three sleepers; and of train No. 9 from Hillsboro to Granger, of two mail, baggage and express cars, three passenger coaches and four sleepers. From Granger to and through Austin the equipment of No. 9 consisted of two mail, baggage and express cars, two passenger coaches and three sleepers.

"That the crews of No. 9 from the north did not come south of Denison, new crews being secured there for defendant's trains Nos. 9 and 209, and new engines were secured at Denison for said trains" (Rec., pp. 65-67).

With respect to the stations at which these trains stopped, the agreement provides:

"That train No. 209 was regularly scheduled to stop at the following stations on defendant's said line of railroad: Whitesboro, Pilot Point, Denton, Fort Worth, Egan, Alvarado and Hillsboro; that train No. 9 was regularly scheduled to stop at Greenville, Rockwall, Garland, Dallas,

Lancaster, Waxahachie, Hillsboro, Waco, Temple, Granger, Georgetown, Austin, San Marcos, New Braunfels and San Antonio; that said trains Nos. 9 and 209 also stopped at other stations on defendant's line of railroad in order to let off any passengers holding tickets from St. Louis or Kansas City to such station and also to let off passengers at stations in cases of emergency, such as sickness or death; that at all stations where defendant's said trains Nos. 9 and 209 are regularly scheduled to stop they take on and let off passengers for the several other stations along its line in Texas where said trains are scheduled to stop" (Rec., pp. 77-78).

It was further agreed that defendant at the time operated three passenger trains each way daily between Denison and Hillsboro, via Fort Worth, in addition to No. 209, and the same number of trains, in addition to No. 9, between Denison and Hillsboro, via Dallas; and that, in addition to No. 9, it operated three passenger trains each way daily between Hillsboro and Waco, four passenger trains each way daily between Waco and Granger, and two passenger trains each way daily between Granger and San Antonio (Rec., pp. 78-79).

W. G. Crush, general passenger and ticket agent for defendant, testified in substance:

"In 1909 the Texas & Pacific Railway Company, the International & Great Northern Railway Company and The Gulf, Colorado & Santa

Fe Railway Company had night trains out of North Texas to St. Louis, Kansas City and a territory where there was a large volume of summer tourist business, which we lost largely because we had no train leaving about the same time; and to meet this situation the 'Katy Limited' was put on. When the discussion of putting on this train came up with a view of taking care of this north-bound travel, Waco began to complain that they had but one through train, the 'Katy Flyer', which left Waco about 4 o'clock in the morning and seriously handicapped them; what they wanted was a day train, as against this very early hour in the morning. Then inquiries were made from other stations. Austin immediately made application, and so did San Antonio—stated that unless we had a train for this northern business that was at least as good as our competitors had we would lose traffic. Investigations were then made all along the line as to what amount of this through business or interstate traffic to St. Louis, Kansas City and other points could be controlled, and it was found that by putting on a high-class interstate train we could control sufficient traffic, at least at that time, to pay for the operation of the train. As it usually takes railroad companies a long time to incur the big expense that was involved in putting on this train, buying equipment and all other expenses incident to it, which in round numbers was about a million dollars, we did not get the train for the early summer tourist business of 1909, but finally got it in September, 1909. The train was primarily, originally and solely put on for the purpose of taking care of our through

or interstate business to and through St. Louis and Kansas City. In Texas the train originated at San Antonio and was operated to St. Louis and Kansas City. The companies interested in its operation were The Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company. There was a very distinct understanding between those companies regarding putting on the train; several conferences were held between the two companies to bring about the train service. Neither could operate that service without the consent of the other. So far as the Texas company is concerned, there would have been no occasion to have put on or operated the train unless it could have had its northern terminus at St. Louis and Kansas City. We operated one train each way daily; those trains were popularly called the 'Katy Limited'. The 'Limited' left San Antonio in the morning at 10 o'clock, reaching Waco about 4 p. m., Dallas about 7:55 or 8 p. m. and Denison about 11 p. m. (Rec., p. 81).

"I have no statistics showing exactly the interstate business and the intrastate business handled on 9 and 209, but from the best information I can get I estimate the percentage of interstate business to be between 70 and 80 per cent of the whole business. * * * My own opinion is that about 75 per cent of the traffic on the 'Katy Limited' was interstate business; that would include southbound trains Nos. 9 and 209, as well as the northbound. It must be remembered that the through traffic or interstate traffic to and from Texas is just reversed; in summer it is north-

bound and in winter it is southbound, so it is a busy train practically during the entire year in both directions with interstate traffic. The Fort Worth section of the 'Limited' carried two sleepers, and the Dallas section carried three. We would not have had on any sleepers if it had been strictly a day train or a train for Texas traffic. We have five immensely heavy specially built sleepers on the 'Limited' through the entire State of Texas for the sole purpose of being in position to accommodate the interstate business from whatever points it may originate to its various destinations, whether it be Kansas City or St. Louis. The only reservations of sleeping-car space that agents in Texas have for the 'Limited' are to either St. Louis or Kansas City and beyond. We have a sleeping-car 'Manual' showing the reservation for each station. * * * There is no space whatever assigned to any agent in Texas that he could use to a point in Texas; it was intended only for the use of our through passengers going to either St. Louis, Kansas City or Chicago. * * * We would certainly have never put on a sleeper out of Dallas to accommodate state business as far as Denison, but there was through business to St. Louis that demanded a through sleeper to take care of that interstate traffic. There was not one assigned for Texas use; they were exclusively for interstate business" (Rec., p. 82).

"The 'Katy Flyer' is exempt from the thirty-minute rule as an interstate train, but it is not anything like the interstate train the 'Limited' is.

If there is an exemption that should be made on account of being interstate it should be the 'Limited'. The Commission did exempt the 'Limited' at one time, since 1909, because it was an interstate train" (Rec., pp. 89-90).

"I think a conservative estimate of the number of passengers delivered by Missouri, Kansas & Texas Railway Company to defendant on train No. 9 at Red River during September, October and November, 1910, would be 110 a day" (Rec., p. 100).

"The distance from Denison to San Antonio, including the distance from Denison to Hillsboro, via Fort Worth, is about 549 miles, and if we had run additional trains to take the place of 9 and 209 when those trains were late, the cost of operation would have been something like one dollar per train-mile. That is the usual basis we figure on (Rec., p. 83).

"But it would have been practically impossible to run those special trains. In the first place, those trains 9 and 209 are advertised to have certain equipment. It would have been practically impossible to assemble and maintain that equipment at Red River or Denison to take those trains out when delayed; the motive power could not have been there. It is not possible to operate a special train, a train of that character and nature, on a few minutes' notice. Aside from that, the cost that would have been necessary to maintain all of that equipment at Red River would have been an expense that would have been absolutely prohibitory; it could not have

been done, even if we had wanted to. In the first place, the Pullman Company would not have furnished sleepers, particularly of that type. It would have been an investment of at least four complete trains to always be in position, and that much motive power out of Denison, to say nothing of the additional motive power from various division points and terminals on through to destination; it would have been a great many thousands of dollars. It cost a million dollars to equip the 'Limited' for operation. It would not cost quite half that much to equip the special trains; it would cost about four hundred thousand dollars; it would have cost many hundred thousands of dollars to furnish that extra train service, and that in no way would have relieved us from running through these daily through trains when they arrived at Red River. The 'Limited' was advertised and published to the world as a through train from Kansas City and St. Louis to San Antonio, and it had to go through regardless of when it arrived at Red River" (Rec., pp. 83-84).

"My estimate as to the cost of equipping these additional trains is based upon furnishing trains of the same character as 9 and 209. Of course, if we equipped only two trains instead of four, the cost would be only one-half as great, and if we omitted Pullmans, that would reduce the cost by about $125,000.00. My estimate does not include the cost of engines" (Rec. p. 91).

"During the time in question there were two trains out of Denison south on our line each day,

that stopped at all stations. Those trains did not carry the same character of equipment and were not the same character of trains as the 'Limited' and the 'Flyer'. We had four trains out of Denison south each day. The 'Limited' was No. 9 and the 'Flyer' was No. 5. The other trains were not as fast as the 'Limited' and 'Flyer,' because they made all the stops; the coaches and chair-cars were of the same type as carried on the 'Limited' and 'Flyer,' but were not new. Those trains were Nos. 1 and 3. The accommodations on trains Nos. 1 and 3 were not anything like as good as on No. 9 because No. 9 carried sleepers. I do not believe Nos. 1 and 3 carried any sleepers south of Fort Worth and Dallas, during the period from September 8th to November 8th, 1910; those are southbound trains. We had a sleeper on Nos. 1 and 2 between Fort Worth and Kansas City. No. 1 was a southbound train; we had a sleeper on there. We had a sleeper on No. 3 from Kansas City to Dallas. Both of the sleepers southbound originated at Kansas City. The trains that we operated besides the 'Limited' and the 'Flyer' carried one sleeper each to Dallas and Fort Worth, but no farther south. The corresponding trains northbound were Nos. 2 and 4; they each had a sleeper, one from Dallas and one from Fort Worth; they carried no sleepers south of Dallas and Fort Worth; there were no sleepers from San Antonio until you got to Dallas going north, and none from Dallas south to San Antonio, and it was the same with ref-

erence to Fort Worth. The Dallas and Fort Worth sleepers on those trains were for Kansas City, outside of the state" (Rec., p. 86).

"The Texas Company is under contract to receive this train No. 9 from the other company at the state line; we have a contract with them agreeing to run the train through whenever delivered. It is manifest that we can not take the train until we get it. If we were to run this special train from Red River or from Denison, when the 'Limited' comes in we would still have to run it; the obligation would be to run it through. With regard to holding the 'Limited' over to make connection with some other train, that would put us out of business; it would destroy the usefulness of the train for this through competitive interstate business for which the train was put on. We could not hold interstate passengers there until some subsequent train was due to go out" (Rec., p. 94).

"The accommodations offered by our trains other than 9 and 209 were adequate to supply every demand of our local passenger traffic. The 'Limited' was not at all required to take care of our intrastate business (Rec., p. 84). It was not necessary to run additional trains as large as 9 and 209 to take care of the passengers inconvenienced by their being held out of Denison. One coach would have taken care of all the traffic, but we did not need the train at all, because the business was not there for it" (Rec., p. 91).

J. Munday, superintendent of defendant's North Texas Division, testified:

> "I estimate the cost of handling extra trains to take the place of 9 and 209 at about 80 cents a train-mile. The cost of operating trains varies under different conditions all the way from 70 cents to $1.50 per mile" (Rec., p. 100).

It was agreed that defendant had on file with the Interstate Commerce Commission regularly published schedules of passenger fares covering the transportation of passengers between points in Texas and points in Oklahoma, Kansas, Missouri and other states of the Union (Rec., p. 102).

ASSIGNMENT OF ERRORS.

The following errors were assigned in this court:

1.

"The Court of Civil Appeals erred in holding that the order of the Railroad Commission of Texas here in question is valid as applied to trains No. 9 and No. 209 of the railway company, because said trains are instrumentalities of interstate commerce, and Congress, acting under power conferred upon it by Subdivision 3, Section 8, Article I of the Constitution of the United States, has so far occupied the field of legislation covered by the order that the state's regulatory power therein has ceased to exist.

2.

"The Court of Civil Appeals erred in holding that the order of the Railroad Commission of Texas involved is not, in its application to trains No. 9 and No. 209 of the railway company, a regulation of, a burden upon or an interference with intertsate commerce, contrary to Subdivision 3, Section 8, Article I of the Constitution of the United States, and therefore void.

3.

"The Court of Civil Appeals erred in holding that the said order of the Railroad Commission

of Texas does not take the property of the railway company without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, because, as applied in this case, it is arbitrary and unreasonable and requires plaintiff in error to run additional passenger trains for which there is no public necessity.

4.

"The Court of Civil Appeals erred in affirming the judgment of the trial court in favor of defendant in error and in entering judgment against plaintiffs in error for penalties in the sum of $14,000.00."

BRIEF OF ARGUMENT.

I.

INTERSTATE COMMERCE.

The order, as applied to trains 9 and 209, regulates, burdens and interferes with interstate commerce.

The trains in question were inaugurated to accommodate interstate passengers, and 70 to 75 per cent of the traffic handled on them is interstate. They are operated between San Antonio, Texas, and Kansas City and St. Louis, Missouri. No change in either crews or equipment is made at the Oklahoma-Texas state boundary line (five miles north of Denison, Texas), said boundary line being the southern terminus of the railroad of Missouri, Kansas and Texas Railway Company and the northern terminus of the railroad of defendant, The Missouri, Kansas and Texas Railway Company of Texas. While there was no change in equipment or crews, the crews became employes of defendant immediately they came upon its rails at the junction point and the trains became at same instant trains of defendant. About this there is no dispute, as shown by agreed statement of facts. There was no station at junction point for receipt or discharge of passengers, the point of junction being on a bridge over the Red River. Attached hereto marked "Appendix A" is a chart

showing lines of the Missouri, Kansas & Texas Railway Company in yellow, and those of defendant in white, and the various states through which they extend, and the point of junction on the Red River. In these circumstances, said trains are clearly instrumentalities of interstate commerce, and the State Supreme Court in denying a writ of error to the Texas Court of Civil Appeals so held. Their movement and the carriage of passengers on them constitute commerce, and if the order regulates, or burdens or interferes with, such commerce, it is void.

It has been repeatedly held by this Court that where a railroad company has provided ample facilities for the adequate accommodation of its local passenger business, a state statute or an order of a State Commission, requiring it to stop an interstate train at stations where it is not scheduled to stop, is void under the Commerce Clause of the Federal Constitution (Illinois Central R. R. Co. v. Illinois, 163 U. S. 142; Gladson v. Minnesota, 166 U. S. 427; Lake Shore, Etc., Ry. Co. v. Ohio, 173 U. S. 285; Cleveland, Etc., Ry. Co. v. Illinois, 177 U. S. 514; Mississippi Railroad Commission v. Illinois Central R. R. Co., 203 U. S. 335; Atlantic Coast Line v. Wharton, 207 U. S. 328; Herndon v. C., R. I. & P. Ry. Co., 218 U. S. 156; C., B. & Q. Ry. Co. v. Railroad Commission of Wisconsin, 237 U. S. 220).

In the first of these cases, Illinois Central R. R. Co. v. Illinois, the Court said (163 U. S. 153):

> "The state may doubtless compel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the state. But so long, at least, as that duty is adequately performed by the company, the state can not, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

In Herndon v. C., R. I. & P. Ry. Co., the Court refers to some of the prior decisions and then says (218 U. S. 156):

> "The principle to be deduced from these cases is, that where a railroad company has already provided ample facilities for the adequate accommodation of the traveling public such as may be proper and reasonable at any given point, and operates interstate commerce trains, carrying passengers through the same places, at which such interstate trains do not stop, a state regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hindrance of interstate traffic, is an unlawful regulation and burden upon interstate commerce."

In C., B. & Q. Ry. Co. v. Railroad Commission of Wisconsin we find (237 U. S. 226):

> "In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the Legislature or by its command through the orders of an administrative body."

The principle applied in those cases is applicable here; for, if a railroad company can not be required to stop an interstate train at given stations when it has provided adequate service for its state business, clearly, under the same conditions, the operation of its interstate trains as to the time of their arrival at and departure from junction points at state lines or particular stations is not a matter for state control.

That defendant furnished adequate accommodations for its local passengers outside of trains 9 and 209 is shown by the uncontradicted evidence (Rec., pp. 84, 91). True, the trial court stated in its conclusions of law that the evidence failed to show that defendant

provided adequate facilities for such business (Rec., p. 35). But this finding is in the face of the evidence, and, in addition, it was set aside by the finding of the Court of Civil Appeals, that the accommodations were adequate (Rec., p. 119). Again, if there were uncertainty about the matter, this Court would examine the evidence and form its own conclusion as to the adequacy of the accommodations. As was said in C., B. & Q. Ry. Co. v. Railroad Commission of Wisconsin, *supra* (226):

> "The fact of local facilities this Court may determine, such fact being necessarily involved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement."

And there can be no doubt that it would find the local facilities adequate.

Upon the authority of the cases already cited, therefore, the judgment should be reversed. But there are other reasons based upon the Commerce Clause of the Federal Constitution why the order can not stand. Under the facts, defendant could comply with the order of the Commission only by running special trains from the junction point on the Red River bridge or from Denison when No. 9 from the north was

delivered to it late by Missouri, Kansas & Texas Railway Company at Red River. Defendant had no control over No. 9, except while on its own rails (Rec., p. 66), and, manifestly, such train could not be held for thirty minutes at junction point on rails of defendant or depart therefrom **until after its actual arrival.** Obviously, then, any train departing on the schedule of such delayed train, and before its arrival, would be a special train, and to meet the schedule such special train must have been run whether regular No. 9 was stopped at Denison or was run through to destination.

Defendant was under contract to receive No. 9, at the junction point on the Red River bridge, whether delivered late or not, and run it through to destination (Rec., p. 94). And, aside from the contract it had to do this or inconvenience the large number of passengers on the train daily—estimated at about 110 (Rec., p. 100)—by compelling them to wait on the Red River bridge or at Denison until the departure of the next train, some six or eight hours later; and thus destroy the very business the train was intended to accommodate. But whether regular No. 9 was stopped at Red River bridge or Denison or was run through to destination, a compliance with the order would require the equipment of other

trains, which the record shows defendant did not have and which would cost from $120,000 to $400,000, according to the number of trains furnished and the character of equipment used (Rec., p. 83). There would also be the expense of operating the train, estimated at from 80 cents to one dollar per train-mile, which would be an additional expense of something like $1,000 every time the regular train was run through (Rec., pp. 83, 100). The running of these special trains would in no way assist in the movement of the delayed regular train or get the interstate passengers on the delayed train to their destinations a minute sooner, but would further delay them, to say nothing of the cost of running the special trains from Denison to handle purely intrastate passengers for whose comfort and convenience sufficient regular trains were provided.

It clearly appears from a most casual reading of the order of the railroad commission that it was not meant to **be in aid** of **interstate trains** or **interstate travel**, but was for the purpose of discriminating in favor of local state passengers at the expense of interstate passengers. As pointed out, the running of a special or substitute train either from the junction point on Red River or Denison would in no way have aided the passengers on the interstate trains, but would have had the result of tying them up high and dry on the Red River bridge or

at Denison, and the substitute train would have simply been in aid of local state passengers, already amply provided for. Furthermore if, under this order, a special or substitute train had been run, the defendant company would have again become subject to the penalties provided by the order if it waited over thirty minutes between Denison and San Antonio for other interstate train connections at junction points with other railroads. In other words, the special or substitute train would have to be run through as an additional accommodation for local state passengers without reference to the convenience of interstate passengers on other railroads at junction points who would be required to await the arrival of next regular train—which might be many hours.

State statutes and orders of the following classes have been held void as applied to interstate commerce; A statute prohibiting the **charging of a higher rate** than that specified in a bill of lading (G. C. & S. F. Ry. Co. v. Hefley, 158 U. S. 98); a statute requiring that, under stated conditions, **cars be furnished within a specified time** without reference to the ability of the carrier to furnish them (H. & T. C. R. R. Co. v. Mayes, 201 U. S. 321); a statute imposing upon the initial or any connecting carrier the **duty of tracing freight and informing the shipper in writing when,** where and by whom the

freight was lost, damaged or destroyed, and of giving the names of persons by whom such facts can be established, and making it liable for a failure to do so (Central of Georgia Ry. Co. v. Murphey, 196 U. S. 194); an order requiring a railway company **to make delivery of cars beyond its right-of-way** (McNeill v. Southern Ry. Co., 202 U. S. 543); a statute imposing a penalty for a **failure to receive a shipment and give a bill of lading therefor,** etc. (Southern Ry. Co. v. Reid, 222 U. S. 424, and Southern Ry. Co. v. Reid & Beam, 222 U. S. 444); and a city ordinance **regulating the number of passengers to be carried on street cars** and the number of cars to be provided (So. Covington & Cincinnati Street Railway Co. v. City of Covington, 235 U. S. 537).

In Seaboard Air Line Railway Company v. Elizabeth Blackwell, 37 Sup. Ct. Rep. 640, a statute of Georgia which **required the engineer of a railway train to blow the whistle of the locomotive at a blow-post, 400 yards from the crossing,** and to keep blowing it until the train arrived at the crossing, and requiring him to check the speed of his train at such blow post and keep it checked until the train reached the crossing, was held invalid under Article I, Section 8 of the Federal Constitution, as being a direct burden upon interstate commerce.

If the matters above mentioned regulated, burdened or interfered with interstate commerce, there can be

no escape from the conclusion that Passenger Circular No. 18, as applied to the trains in question, does so.

The case of South Covington & Cincinnati Street Railway Co. v. City of Covington, *supra*, is decisive of this question. There the Court, after setting out the ordinance attacked, stated the facts as follows (235 U. S. 544-45):

> "The testimony shows that the plaintiff is a Kentucky corporation, and its principal occupation is the carrying of passengers in connection with an Ohio corporation which operates on the other side of the Ohio River, upon continuous and connecting tracks, and across a bridge from Covington to Cincinnati, which this Court has held to be an instrument of interstate commerce (Covington, Etc., Bridge Co. v. Kentucky, 154 U. S. 204). This traffic is conducted by means of continuous trips and for a single fare, between points on the lines of the railway in Covington and Fourth street or Fountain Square in the City of Cincinnati, or from any point between Fourth street or Fountain Square in the City of Cincinnati to points in the City of Covington. Practically every car is thus engaged in going to or coming from Cincinnati, and from seventy-five to eighty per cent of the passengers carried in the City of Covington are being transported from Covington to Cincinnati, or from Cincinnati to Covington or farther in Kentucky. The cars operate without change of motormen or

conductors, and under the direction of the same officers."

Those facts are singularly like the facts here involved. We have two corporations, one a Texas company and the other a Kansas company. Their lines anite at Red River forming a through line from San Antonio, Texas, to Kansas City and St. Louis, Missouri, and they are engaged in the operation of through trains between said cities, which trains are composed of the same equipment and are handled by the same crews throughout, except in so far as it is necessary to change engines or set out or pick up additional equipment and change crews at terminals. No stop is made at the state line. The through train was inaugurated to accommodate interstate traffic and from 70 to 75 per cent of its passengers are interstate (Rec., pp. 65-67, 81, 82).

The opinion of this Court in case last cited states:

"This Court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion. Here is an uninterrupted transportation of passengers between states, on the same cars, and under practically the same management and for a single fare. We have no doubt

that this course of business constitutes interstate commerce.

* * * * * * * * *

"Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the Federal Congress, the further question is presented: Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution?"

The Court then refers to the rule authorizing the states in the interest of the public health and safety to pass regulations which incidentally or indirectly affect interstate commerce, quoting from the Minnesota Rate Cases, 230 U. S. 352, and continues:

"In the light of the principles settled and declared, the various provisions of this ordinance must be examined. That embodied in sections 1 and 6 makes it unlawful for the company to permit more than one-third greater in number of the passengers to ride or be transported within its cars over and above the number for which seats are provided therein, except this provision shall not apply or be enforced on the Fourth of July, Decoration Day or Labor Day, and by section 6 it is made the duty of the company operating the cars within the City of Covington to run

and operate the same in sufficient numbers at all times to reasonably accommodate the public, within the limits of the ordinance as to the number of passengers permitted to be carried, and the council is authorized to direct the number of cars to be increased sufficiently to accommodate the public if there is a failure in this respect. To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges, held by the company, or controlled by it, in that city. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the state. We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and

interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in Hall v. DeCuir, 95 U. S. 485, 489, 'commerce can not flourish in the midst of such embarrassments.'

"We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

How pertinent those statements to the case at bar! They are a complete answer to the reasons assigned by the Supreme Court of Texas in refusing a writ of error.

If the State of Texas can enforce this order, then the States of Missouri, Kansas and Oklahoma can enforce similar orders against the operation of these through interstate trains, and all of these orders would be enforceable, not only as against south-bound trains, but against north-bound trains. As applied to these particular trains, if they should pass any state boundary line over thirty minutes late, then the

railway companies operating these trains would have to provide substitute or special trains to run through each state to accommodate the local state passenger business which, presumably, is already well taken care of. This particular order illustrates some of the difficulties the railroads of the country suffer by reason of their regulation by forty-eight different masters (even as applied to interstate travel), if we are to accept the opinion of the Supreme Court of Texas in denying the writ of error, that these regulations are in aid of interstate travel.

At this particular time, under agreement, all of the railroads of the country are practically being operated as one system of railroads, in order to properly serve the government needs in the transportation of its mails, troops, munitions and supplies, and it would be most disastrous if an order of a State Commission of this kind should be upheld withdrawing, as it would, from the real necessities of the transportation business, a large amount of motive power and equipment for the accommodation of state travel already well provided for, and in the face of the fact that, under advice of the National Council of Defense, there has been a widespread movement to curtail in every way possible the running of unnecessary passenger trains so as to facilitate the movement of freight, government troops, munitions and supplies

and comply with the priority provision in recent amendment of the Act to Regulate Commerce.

Now, certainly, is a time when the **revenues**, as well as the **transportation energies and facilities**, of carriers should be **conserved** and **not wasted** through the enforced observance of forty-eight varieties of state regulation of **inter**state commerce under the guise of reasonable regulations thereof in the absence of federal regulations, which, however, in fact are not only burdensome but destructive regulations of interstate travel and the instrumentalities thereof. The sole result (if not the sole purpose) of the order in question is to **favor state travel** and **state commerce** at the **expense** of **interstate travel and interstate commerce**. A "Chinese wall" should not be permitted to be built on the Texas state boundary (or other state boundaries), as a barrier to the free movement of interstate commerce, in the face of section 10058, United States Compiled Statutes 1916 (Vol. X, page 12322), which provides:

> "Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the

transportation of the same to the place of destination."

It has been the purpose of Congress, as shown by this and other statutes, constantly to promote and often to require the formation and operation of continuous lines of transportation. Union Pac. R. R. v. C. R. I. & P. Ry., 51 Fed. 309; affirmed in 163 U. S. 564.

In The Saint Louis, 48 Fed. 312, it was held that this section was passed by Congress under the "commerce clause" of the Constitution and authorizes continuous lines of railroad from one state to another, and thus secures interstate commerce against obstacles, even if attempted by state action.

In Council Bluffs v. Kansas City, St. J. & C. B. R. Co., 45 Iowa 338, it is held that certain sections of the Iowa Code, requiring railway companies connecting with the Union Pacific Railway to transfer their freight, passengers, and express matter at Council Bluffs, were in conflict with this act, as being a state regulation of commerce.

Other phases of so-called reasonable regulations of interstate commerce by state commissions have recently been condemned by this Court in Houston East & West Texas Ry. Co. v. United States, 234 U. S. 342 (commonly known as the Shreveport Case); J. Sam Rowland *et al.* v. Sidney E. Boyle *et al.*, 37 Sup.

Ct. Rep. 577 (the recent Arkansas Rate Case); American Express Co. v. South Dakota, 37 Sup. Ct. Rep. 656.

In the Arkansas Rate Case this Court said:

> "Light is thrown upon the position of the state by the decision of the Interstate Commerce Commission in Memphis v. Chicago, R. I. & P. R. Co., 39 Inters. Com. Rep. 256, 265: 'The present **unduly low rates within Arkansas are due at least in part to the attempt by the Railroad Commission of Arkansas to protect Arkansas shippers and build up Arkansas jobbing centers.**' In that case it was intimated that the carriers would be required to remove discriminations resulting from the unduly low rates, as was done in the Shreveport Case (Houston E. & W. T. R. Co. v. United States, 234 U. S. 342, L. Ed. 1341, 34 Sup. Ct. Rep. 833)."

There is nothing in Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, that militates against our contention. The order there involved, as the Court held, simply required the carrier to furnish facilities for local traffic which it was obligated by its charter to furnish. Such facilities, the record shows, have voluntarily been furnished by defendant in this case, and therefore the question there decided is not here involved.

If it be said that the order may be sustained as an exercise of the **police power** of the state, we answer that it does **not come within the police power.** As

was said in Herndon v. C., R. I. & P. Ry. Co. (218 U. S. 135, 157):

> "It is to be remembered that this statute (order) is not of that class passed in the exercise of the police power of the state for the promotion of the public safety and requiring the stoppage of trains by one railroad before crossing the tracks of another railroad—this statute (order) * * * was passed for the purpose of providing greater (better) facilities of travel, and not for the protection of life and limb."

But if the order were within the police power, "**the police power of the state does not give it the right to violate any provision of the Federal Constitution**" (Central of Georgia R. R. Co. v. Murphey, 196 U. S. 206). The police power, as all other powers, must be exercised by the states with respect to constitutional limitations (Yick Wo v. Hopkins, 118 U. S. 356; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79; Kansas City Southern Ry. Co. v. Kaw Valley Drainage District, 233 U. S. 75, 79).

In the last case cited the Court said, with respect to the police power and interstate commerce:

> "The decisions also show that a state can not avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a

direct interference with commerce among the states could not be justified in this way."

The State Supreme Court in denying a writ of error suggests and plaintiff contends that the order can be sustained as an aid to interstate commerce in the absence of Federal legislation. But there are two reasons why this is not true. In the first place, the order so directly affects interstate commerce as to constitute a regulation of it, and, that being the case, it is immaterial whether its provisions aid or burden such commerce. The Constitution does not read that Congress shall have the power to regulate interstate commerce, unless the states can do better. There is no divided authority in this field. The power of Congress to regulate is exclusive and supreme. And, in the next place, the effect of the order is to burden, and not to aid, interstate commerce. The mere fiat of the Commission can not make the trains run on time. Everybody knows trains never have been and never will at all times be run on time. If special trains are operated in addition to the regular trains, the order can not affect the interstate passengers, and they would have no interest in it. Its only effect in that event would be to require defendant to spend anywhere from $120,000.00 to $400,000.00 for additional equipment, and to incur an expense of something like $1,000.00 a day to haul intra-state passengers already amply provided for because its

connecting carrier failed to deliver the regular interstate train on time. That expense would undoubtedly constitute a burden, and the burden would fall upon interstate commerce, for defendant would incur it as a kind of penalty for trying to operate an interstate train. The burden would be so great as to compel the abandonment of the through interstate trains. If the regular train is not run through a large number of interstate passengers will be held at Red River bridge or Denison to wait the departure of other trains, which, beyond question, would be an interference with interstate commerce and a burden upon it.

II.

DUE PROCESS OF LAW.

The order of the Commission is void under the due process of law clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

We have previously shown that defendant has no control over the regular trains until they are delivered to it at Red River by Missouri, Kansas & Texas Railway Company, and that the order can be complied with only by running special trains. When late deliveries are made, therefore, defendant, under the order, must either run additional trains or suffer the penalties provided by law. The penalties are

not to exceed $5,000.00 for each violation of the order, and the record shows that the trial court actually assessed $500.00 for each adjudged infraction of the law. As elsewhere stated, it would cost defendant from $120,000.00 to $400,000.00 to equip special trains, to say nothing of the cost of operating them. All of this expense must be incurred, be it remembered, or a large interstate business destroyed without any public necessity; for, as the only witness testifying on the point repeatedly stated, defendant's facilities outside of trains 9 and 209 were adequate to care for its local or intrastate business, and the additional trains were not necessary to give good service.

That the State can not demand facilities or accommodations at the hands of a railway company for which there is no public necessity is not now open to question (Oregon Railroad & Navigation Co. v. Fairchild, 224 U. S. 510; C. B. & Q. Ry. Co. v. Railroad Commission of Wisconsin, 237 U. S. 220; Great Northern Ry. Co. v. Minnesota, 238 U. S. 340; Mississippi Railroad Commission *et al.* v. M. & O. R. R. Co., 37 Sup. Ct. Rep. 602).

In Mississippi Railroad Commission *et al.* v. Mobile & Ohio R. R. Co., *supra*, it was held that orders of the Railroad Commission of the State of Mississippi, directing an interstate railway carrier to restore to service six passenger trains, were arbi-

trary and unreasonable and could not be enforced, and that if enforced would result in depriving the railway company of its property without due process of law as is forbidden by the Fourteenth Amendment to the Constitution of the United States, it appearing that part, at least, of the remaining train service was not inadequate for local needs.

In Oregon Railroad & Navigation Co. v. Fairchild the Court had under review an order of the Railroad Commission of the State of Washington requiring certain track connections. The railroad company resisted the order on the ground that there was no public necessity for the improvements. The contention was denied by the State Court, but this Court sustained it, and held the order void.

Great Northern Railway Company v. Minnesota, *supra*, involved an order of the Railroad and Warehouse Commission of the State of Minnesota directing the railway company to construct certain scales. The order was declared void, the Court saying (238 U. S. 345):

> "Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances.
>
> "The applicable principles were announced in Oregon Railroad, Etc., Co. v. Fairchild, 224 U. S. 510, 524. A taking of railroad property under

administrative regulation must 'be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet'. The facts being established, the question then presented is whether, as matter of law, they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not conclusive (Interstate Commerce Commission v. Louis. & Nash. Railroad, 227 U. S. 88, 91; Florida East Coast Line v. United States, 234 U. S. 167, 185)."

In C. B. & Q. Railway Company v. Railroad Commission of Wisconsin, *supra*, where the Court was considering a statute and order requiring an interstate train to stop at certain stations, we read (page 231):

"The Court, however, said that neither the statute nor the order of the Railroad Commission requires the railroad to stop one of its limited trains, but it has the option of doing that or of putting on an extra train, and Lake Shore Ry. v. Ohio, *supra*, is cited to sustain the alternative. Undoubtedly the alternative can be required, but only if the local facilities be inadequate. In other words, to justify the requirement the local conditions must justify the extra facility (Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, 528)."

This is also the doctrine of the Texas courts, as stated in Railroad Commission of Texas v. Galveston, Harrisburg & San Antonio Ry. Co., 112 S. W. 345, involving an order of the State Commission directing the railway company to put on additional trains. Suit was brought by the railway company to enjoin the order, and in its petition it alleged that the train service already furnished was adequate and that the public necessities did not demand the additional trains. "This", said the Court, "is about all that could be required of the road, and it certainly ought not to be required to operate trains for which there is no need".

The Court of Civil Appeals in the present case found that defendant's local facilities are adequate. The finding is quoted in the statement of the case, but it will bear repetition here:

> "The uncontradicted evidence, we think, amply sustains appellant's contention that during the period in controversy it furnished ample facilities, independent of said through trains, for the accommodation of its passenger traffic on its lines south of Denison, in that it had three passenger trains each way daily between Denison and Hillsboro, via Dallas and Fort Worth; three passenger trains each way daily between Hillsboro and Granger, and two passenger trains each way daily between Granger and San Antonio, in addition to said trains Nos. 9 and 209, or a total of four trains each way daily between Denison

> and Granger, and three trains each way daily between Granger and San Antonio—two of the additional trains between Denison and Granger stopping each way daily at all regular stations, and one of them between Granger and San Antonio" (Rec., p. 119).

This finding, in the original opinion, was in no wise modified by the opinion on plaintiff's motion for rehearing (Rec., pp. 143-145), and therefore still stands as it must under the undisputed facts.

But if the finding were otherwise, this Court would determine the question for itself, and to that end would examine the whole record, and the evidence as a whole leaves no room for any other conclusion than the one stated by the Court of Civil Appeals.

About the most that can be said for the order is, that the additional trains would be an added convenience for a few local passengers already well provided for, but would in no way be an aid to interstate passengers. But **convenience** in any case does not make **necessity**. As was said in C., B. & Q. Ry. Co. v. Railroad Commission of Wisconsin, *supra*:

> "Of course, there would be some convenience at times in two extra trains—indeed, in more than two—and they may be desired; but desire is not a test of requirement, nor is convenience, absolutely considered. There is a traffic to be considered which does not originate at Cochrane, and its convenience can not be put out of view.

Besides, as said by Timlin, J., in his dissenting opinion, 'Convenience is an elastic term, and no doubt it would be more convenient to have a train stop every hour at this village, and it would be confessedly inconvenient if no trains at all stopped there. Between these extremes there is no doubt a broad field of legislative discretion.' This Court has also felt and expressed the difficulty of giving an exact definition to 'adequate and reasonable facilities'. 'It is a relative expression,' it was said, 'and is to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodation asked for, and to all other facts which would have a bearing upon the question of convenience and cost' (Atlantic Coast Line v. Wharton, *supra*, p. 335)."

In the Fairchild case, above cited, it was held that an order requiring a railroad company to expend money for the purpose of making track connections was a taking of property; and in Great Northern Railway Company v. Minnesota, *supra,* it was said that an order requiring a railway company to install and maintain track scales takes its property. For the same reason the present order, which requires the purchase, maintenance and operation of additional equipment at a large expense, must be held to constitute a taking of property, and then the question

arises whether such taking is without due process of law.

Since the uncontradicted evidence and the finding of the Court of Civil Appeals show that there is no public necessity for this expenditure, the cases cited leave no room for doubt on this point. The conclusion is inevitable that the taking of defendant's property is without due process of law, and upon this ground also the order is void.

"The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation" or without due process of law (C., M. & St. P. R. R. v. Wisconsin, 238 U. S. 501).

Wherefore, plaintiff in error prays that the judgment of the Court of Civil Appeals be reversed, and that the cause be remanded for disposition in accordance with the foregoing views.

Respectfully submitted,

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INDEX.

Subject. Page.

Due Process.—The order of the Commission is not void under the due process clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States..23-31

Costs involved 7-8, 25-27

Local facilities inadequate.....2, 3-7, 10, 12, 24

Loss not shown.....28-30

Interstate Commerce.—The order, as applied to the trains in question, does not regulate, and does not unreasonably or unlawfully burden interstate commerce.....11-23

Convenience—Order designed and results to promote public convenience, generally 11-16, 22

Convenience—Order incidentally promotes convenience of interstate travelers 11-12, 17, 22

Interstate Commerce—Effect on is indirect and incidental, and in aid of.....10, 11, 12, 17, 22

Local Facilities—Other facilities inadequate.....2, 3-7, 12

New Conditions—Suggested by plaintiff in error for consideration of the court.....31-32

Statement of the Case 1-11

Accidents—Order not applicable to delays caused by..... 2

Conclusions of law..... 2

Connecting lines 8

Extra Trains—Order does not require, but may be complied with by 2, 7

Extra Trains—Extra trains operated voluntarily....2, 7, 23, 26

Extra Trains—Cost of.....7-8, 25-27

Findings of fact.....2, 7, 10-11

Interstate Traffic—Proportion not shown..... 4

Judicial Review—Texas law provides for judicial review, preliminarily 1-2

Local Facilities—Other facilities inadequate....2, 3-7, 10, 12, 24

Notice and Hearing—Order made after..... 1

Revenues—Partial ticket sales for three months..... 6

Schedules—Not complied with.....9-10, 11

LIST OF CASES.

Page.

Atlantic Coast Line vs. North Carolina Cor. Com, 206 U. S., 1 ..... 14, 19, 28, 30
C. C. C. & St. L. Ry. Co. vs. Illinois, 177 U. S., 514..... 12
Escanaba Company vs. Chicago, 107 U. S., 678..... 14
Gladson vs. Minnesota, 166 U. S., 427..... 18
Gulf, C. & S. F. Ry. Co. vs. Texas, 169 S. W., 385..... 24
Henderson Bridge Co. vs. Kentucky, 166 U. S., 150..... 18
Lake Shore & Michigan Southern Ry. Co. vs. Ohio, 173 U. S., 285 ..... 14, 21
L. & N. Ry. Co. vs. Kentucky, 161 U. S., 701..... 18
Minnesota Rate Cases, 230 U. S., 352..... 4, 12, 27, 30
Missouri Pacific Ry. Co. vs. Kansas, 216 U. S., 262..... 30
Mobile County vs. Kimball County, 102 U. S., 691..... 22
N. Y., Lake Erie & Western R. R. Co. vs. Penn., 158 U. S., 431 18
New York, N. H. & H. R. R. Co. vs. New York, 165 U. S., 628. 21
R. R. Commission vs. G., H. & S. A. Ry. Co., 112 S. W., 345..2, 30
Railroad Tax Cases, 15 Wall., 284..... 18
Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362..... 2
South Covington, etc., St. Ry. Co. vs. Covington, 235 U. S., 537 ..... 14, 19-21
Texas vs. St. Louis S. W. Ry. Co., 165 S. W., 491..... 2

A184-1117-50

No. 113.

In the Supreme Court of the United States

(October Term, 1917.)

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

It is not believed that the "Statement of the Case" as made in the brief for plaintiff in error is complete or accurate.

The order of the Railroad Commission of Texas, involved in this case, was made after notice and hearing, under the authority granted by Article 6552, R. S., 1911 (copied on pages 4 and 5 of the brief for plaintiff in error) and other laws of the State.

Under the State procedure, plaintiff in error, or any other interested carrier, at any time, may make application to the Railroad Commission to have said order suspended or modified so as to have any or all of its trains exempted from the operation thereof.

If such relief should not be granted, and should be warranted by the facts, or if the order is believed to be unreasonable or invalid for any reason, the plaintiff in error, under the authority of Article 6657, Revised Civil Statutes of Texas, 1911, had the opportunity, at any time after the entry of the order, to bring a direct proceeding in the Federal court or in the State courts to have the validity of the order tested in whole or with respect to

its operation on any train or any number of trains (see Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362; Railroad Commission vs. G., H. & S. A. Ry. Co., 112 S. W. Rep., 345); or, after suit was filed for penalties, the plaintiff in error,—under the blended law and equity practice of the State,—could have, by cross-bill, set up the invalidity of the order (State vs. St. L. S. W. Ry. Co., 165 S. W. Rep., 491); and immediately upon the filing of a direct proceeding under Article 6657, or immediately upon the filing of a cross-bill, the court could have instantly suspended the operation of the order, and no penalties could have accrued thereunder, pending the final determination of the validity thereof. (See Railroad Commission vs. G., H. & S. A. Ry. Co., 112 S. W., 345.) No proceeding was taken by the plaintiff in error to have the validity of the order thus preliminarily tested, but it awaited until the suit for penalties was filed and relied upon the supposed invalidity of the order as a defense.

The order makes its provisions inapplicable in case a train is delayed en route by "unavoidable accidents." (Pr. Tr., p. 25.) Plaintiff in error neither pleaded nor attempted to prove that the failure to comply with the requirements of the order was due to accident, or other causes beyond its control.

The order does not undertake to require the running of extra trains in cases where the regularly scheduled trains are "late" (Tr., p. 25), but the trial court found as a fact that plaintiff in error could have conformed to its schedule, at a reasonable expense, by running the trains in two sections. (Finding 20, Tr., p. 35.)

The trial court concluded that:

"(4) The other passenger trains provided by defendant outside of Nos. 9 and 209 were not during the period of time in controversy adequate and sufficient to accommodate the local and intrastate passenger traffic on defendant's line of railroad.

"(5) The evidence fails to show that during said period of time defendant had provided adequate facilities to accommodate the traveling public by providing sufficient other passenger trains

and so arranging the schedule of same for that purpose." (Tr., p. 35.)

This conclusion is assailed by plaintiff in error before this court, but no attack is made upon the finding of specific facts upon which the conclusion was based. These facts are substantially as follows:

The lines of the plaintiff in error serve a large number of the principal towns and cities of the State, including Denison, Sherman, Greenville, Dallas, Fort Worth, Denton, Waxahachie, Hillsboro, Waco, Temple, Taylor, Austin, San Antonio, San Marcos, New Braunfels, Smithville, Bastrop, Houston and Galveston. (Tr., p. 84.) The runs from Denison to San Antonio and Galveston are more than 500 miles in length. (Tr., p. 83.) The lines traverse a thickly populated section of the State. (Tr., pp. 84-85.) None of the other trains operated by plaintiff in error were of anything like the same "class" as the trains in question; they did not carry "the same character of equipment and were not of the same character of trains as the 'Limited.'" (Tr., p. 86, lines 7 to 10.) The other trains were not "as fast as the Limited and Flyer" because they made all the stops; the accommodations on the other trains "were not anything like as good as on No. 9" because No. 9 carried sleepers; the other trains carried no Pullman or sleeping car service south of Fort Worth and Dallas; no sleepers were operated for the three hundred miles, or more, between Dallas and Fort Worth, on the north, and San Antonio and Galveston, on the south, except upon the trains in question. (See testimony of W. G. Crush, general ticket agent for plaintiff in error, Tr., p. 86.) Plaintiff in error operated three other trains southbound, per day,—one of which, No. 5, called the "Flyer," was exempted from the operation of the order,—and the other two, the court found, "were purely local trains and ran on a slow schedule" (see 12th finding of fact, Tr., p. 32); these three trains were only operated as far south as Granger, and from there to San Antonio only two other trains were oper-

ated, southbound, per day (see 17th finding, Tr., p. 34): northbound, plaintiff in error operated two trains per day from San Antonio to Granger,—about 130 miles,—one of which, No. 5, was exempted from the order and the other of which was purely a local train making all stops (17th finding, Tr., p. 34); from Granger, north, it operated three other northbound trains per day, one of which, No. 5, was exempted from the order, the other two being run on a slow schedule and making all stops (17th finding, Tr., p. 34). The trial court found that the schedules of the other trains were not so arranged as properly to serve the traveling public. (5th conclusion, Tr., p. 35.)

The trial court found as a fact that the trains here in question "carried both State and interstate passengers, but the evidence fails to disclose the proportional part of interstate and intrastate passengers carried by said trains during the period of time in controversy" (19th finding, Tr., pp. 34-35), and concluded that the trains "were not engaged solely in interstate commerce." (6th conclusion, Tr., p. 35.) On page 37 of their brief, counsel for plaintiff in error assert that "70 to 75 per cent of the traffic handled" on these trains is interstate; but there is no substantial evidence in the record to justify this assertion, and it is in direct conflict with the finding of fact made by the court to the effect that evidence does not disclose the proportion of the traffic which is interstate. The assertion is based alone upon the testimony of Mr. Crush, General Ticket Agent for plaintiff in error, but his testimony shows that he was only giving an estimate which he himself said was a mere "guess." (Tr., p. 87, lines 27 to 31.) He had no records to show what proportion of the traffic was State and what interstate. (Tr., p. 87.) This was the only effort made to prove the proportions as between State and interstate traffic; and the State court held that it was insufficient, in view of the other circumstances of the case. In this it would seem that the court is amply supported by the remarks of this court in the Minnesota Rate Cases, 230 U. S., 352, 452, with respect to attempts to

invalidate State action by conjecture as to facts; says the court: "The constitutional invalidity must be manifest and if it rests upon disputed questions of fact, the invalidating facts must be proved." Mr. Crush testified that about 110 passengers per day, southbound, were on these trains when they crossed the State line (Tr., p. 100); but each of the trains had a seating capacity of 365 passengers. (Tr., pp. 100-101.)

During the months of September, October and November, 1910, plaintiff in error, at its stations between Austin and Denison (not including the line from Granger to Galveston a distance of about — miles, or the line from Dallas to Wichita Falls), sold tickets to intrastate passengers in numbers as follows: September, 76,-036; October, 117,406; November, 110,339. (Tr., p. 101.) Of the country through which the line runs from Denison to San Antonio, Mr. Crush, General Ticket Agent, said:

"The territory through which our line ran from Denison by Dallas to Hillsboro was during the time mentioned what we consider a very thickly settled country down here; that was also the case in reference to the country through which our line ran from Denison by way of Ft. Worth to Hillsboro. Besides Dallas and Ft. Worth, our line ran through Greenville and Waxahachie, which I consider fairly good-sized towns. Our Ft. Worth line runs through Denton, Pilot Point, and Whitesboro, but they don't amount to much. There are several towns of from four or five to ten thousand inhabitants on the two lines from Denison to Hillsboro. Our line runs through a thickly populated country from Hillsboro to Austin, passing through several good towns—Waco, Temple, and Georgetown. Bartlett and Holland are not of much importance. From Austin to San Antonio our line passes through San Marcos and New Braunfels, which are flourishing towns with a good future. During that time our road had, comparatively speaking with other roads in Texas, a heavy passenger traffic." (Tr., pp. 84-85.)

These trains were scheduled to stop at the following stations in Texas for the receipt and discharge of passengers, and passengers were carried between each and all of the stations named, towit:

Denison, Greenville, Rockwall, Garland, Dallas, Lancaster, Waxahachie, Hillsboro, Whitesboro, Pilot Point, Denton, Ft. Worth, Egan, Alvarado, Waco, Temple, Granger, Georgetown, Austin, San Marcos, New Braunfels, San Antonio, Taylor, Smithville, Houston, Galveston. (Tr., pp. 113-114.) The population of some of those towns were as follows: Denison, 13,632; Greenville (county seat), 8850; Rockwall (county seat), 1136; Garland, 804; Dallas (county seat), 92,104; Lancaster, 1115; Waxahachie (county seat), 6205; Hillsboro (county seat), 6115; Waco (county seat), 26,425; Temple, 10,993; Granger, 1708; Georgetown (county seat), 3096; Austin (county seat, State capital), 29,860; San Marcos (county seat), 4071; New Braunfels (county seat), 3165; San Antonio (county seat), 96,614; Whitesboro, 1219; Pilot Point, 1371; Denton (county seat), 4732; Fort Worth (county seat), 73,312; Alvarado, 1155. (Tr., pp. 101, 102.)

The defendant introduced in evidence a statement showing the number of local and interline State tickets sold and the revenue therefrom at each station between Austin and Denison, via both the Dallas and Fort Worth divisions, which statement is hereto attached and made part hereof. Said statement shows that for the month of September, 1910, there were sold 76,036 tickets, with a revenue of $118,925.10; for the month of October, 1910, 117,406 tickets, revenue $118,903.73; for November, 1910, 110,339 tickets, revenue $167,759.01. The last half of the sheet shows interline State tickets and the through revenue therefrom, being tickets sold on the defendant's line to go to points of destination on the line of some other railway company in Texas, the revenue shown being the total revenue received from the sale of such tickets, showing that for September, 1910, there were 2145 tickets, with a revenue of $15,205.10; for October, 1910, 2888 tickets, revenue $14,054.25; November, 1910, 1999 tickets, revenue $13,365.50. (Tr., p. 101.)

It was agreed that during the period in controversy the defendant, whenever its passenger traffic was such as to justify or require it, operated additional sections of its trains Nos. 5, 206,

9, 209, 10 and 210; that in such cases the second section, when only one additional section was operated, took the same number and was operated on practically the same schedule as the first section of the train; that if a third train should have been required it would have been designated the third section of No. 5 or No. 6 or No. 9 or No. 209, as the case might be, and if a fourth section should have been required it would have been designated the fourth section of such train, and so on. The third and subsequent sections, if any, would have been operated on the same track and would have followed substantially the same schedule as the first and second sections. (Tr., p. 102.)

The 20th finding of fact reads as follows:

"That during the period of time in controversy the defendant could, at reasonable expense, have operated its said trains Nos. 9 and 209 south from Denison in two sections, so as to comply with its published and advertised schedule for said train's arrival at its several stations south of Denison, and still have cared for its interstate passengers arriving at Denison over the M., K. & T. Railway Company on its train No. 9." (Tr., p. 35.)

Counsel for plaintiff in error, on page 43, and at other places of their brief, assert that it would cost from $120,000 to $400,000 to provide for the running of "extra trains" to conform to the advertised schedules when the regular trains could not do so. But this is unbelievable, and has no warrant in the record, except the expression of opinion of the ticket agent of the plaintiff in error. It has just been shown that frequently these trains are run in two or more sections; this being true, is it not necessary that the equipment therefor is already available? And when the trains are run in two or more sections the order is voluntarily complied with. Besides, counsel, and their witness assume, that the "extra" train would have to carry the same equipment as the regular, towit: five Pullman cars, two chair cars, a combination smoking chair car, diner, etc, etc.; this assumption is incorrect; there is nothing in the order,—even if it would incidentally com-

pel the operation of an extra train occasionally,—to require any such expensive equipment; in that event the demands of the law would be met when adequate facilities were furnished. Counsel, and their witness, also assume that the equipment of the "extra" train would have to be reserved for this service alone; there is nothing to justify the assumption, and the court perhaps judicially knows that there is always enough unused equipment on hand to meet emergencies in railroad operation.

W. G. Crush, witness for plaintiff in error, testified as follows with respect to connecting lines crossed by these trains:

"With reference to how many railroads or how many points on our line south of Denison to San Antonio we cross or intersect or have junction points with other railroads, on the line from Denison to Dallas the first crossing is at Bells, where we cross the Texas & Pacific; there is no other road there. At Whitewright we cross the Cotton Belt; at Celeste the Santa Fe; at Greenville the Cotton Belt and the Texas Midland, and there we also had a branch from Mineola and Shreveport; at Garland we intersect the Santa Fe; at Dallas we cross or intersect or connect with the Texas & Pacific, the Santa Fe, the H. & T. C., the Cotton Belt, the "Frisco," the T. & B. V., the T. & N. O., and I think the Rock Island was in there then; south of Dallas, at Lancaster we cross the H. & T. C., a branch line; at Waxahachie, the H. & T. C. and T. & B. V.; at Hillsboro, the Cotton Belt and T. & B. V. On the line from Denison around by Fort Worth, at Whitesboro we intersect the T. & P.; at Whitesboro we have a branch to Wichita Falls; at Denton we have a line of our own down to Dallas; at Fort Worth we cross or intersect the Santa Fe, the H. & T. C., the Fort Worth & Denver, the T. & P., the Rock Island, the "Frisco," the I. & G. N., and the Fort Worth & Rio Grande. The line of the Santa Fe at Fort Worth is a different branch from their lines at Dallas and Celeste. The "Frisco" is two systems, the Fort Worth & Rio Grande and the St. Louis & San Francisco; they are two different railroad corporations, with different corporate names, but all under one system. Coming on from Fort Worth towards Hillsboro, at Alvarado we cross the Santa Fe's Dallas branch at Cleburne; cross it first at Egan. I forgot one crossing on the Dallas line; that

is at Italy, where we cross the I. & G. N.'s line. There is no other crossing until we get to Waco, where we cross or intersect the Texas Central, I. & G. N., H. & T. C., the Cotton Belt, and the S. A. & A. P.; at Temple we intersect the Santa Fe and a little road called the Temple & Northwestern, and at Bartlett there is the Bartlett road, but I don't believe it was being operated; there is nothing else, except at Echo we have our own line to Belton—that really goes into Temple. The next connection is at Granger; from Granger on south we have two lines, one being the Austin division and the other the Houston and Galveston division. Coming on south from Granger, at Georgetown we intersect the I. & G. N.; we do not go to Taylor coming to Austin; Taylor is on the line to Houston; at Palm Valley we cross the I. & G. N., but there is no stop there; at Austin we cross or intersect the H. & T. C. and the I. & G. N.; at Austin there are two branches of the H. & T. C,. one to Houston and one to Llano, and we connect with both. From Austin to San Antonio we cross or connect with the I. & G. N. at San Marcos and with the I. & G. N. at New Braunfels; at San Marcos we connect with our line between San Marcos and Smithville; Lockhart is on that line." (Tr., pp. 85, 86.)

In paragraph 10 of the petition filed by defendant in error in the district court of Travis county, Texas, it was alleged that "from the 8th day of September, 1910, to the 8th day of November, 1910, and including both of said dates, defendant's said passenger train No. 9 was, by defendant's published and advertised schedule, due to arrive at and depart from said regular stations at Denison, Dallas, Hillsboro, Granger and Austin on defendant's said line of railroad as follows: Leave Denison 6:25 a. m., arrive at Dallas at 9:15 a. m. and depart therefrom at 9:40 a. m.," etc., etc. (Tr., p. 7); and that "defendant is required under the law and under said orders of the Railroad Commission of Texas * * * to start said passenger train No. 9 from the point of its origin in accordance with said advertised schedule as above alleged, and to conform the running of said train to said published schedule as to the arrival and departure of said train at said stations of Denison, Dallas, Hillsboro, Granger and Aus-

tin and the several other stations on and along its said line of railroad, but that defendant is authorized to hold said train not to exceed thirty minutes at the point of origin and at junction points with other lines," etc., etc. (Tr., pp. 7-8.) By paragraph 11 of said petition like allegations were made with respect to train No. 209. (Tr., p. 8.) Paragraphs 12 and 13 of said petition alleges that said train No. 9 did not comply with said orders or schedules on fifty separate dates, and that train No. 209 did not so conform on thirty separate dates. (Tr., pp. 8-17.) In paragraph 2 of its answer plaintiff in error admits the truth of the allegations contained in said paragraphs 10, 11, 12 and 13 of the petition, except that it did not admit "the legality" of the order. (Tr., p. 19.)

The order of the Commission leaves the carriers free to arrange their own schedules. (Tr., p. 3.)

The 1st, 2d, 3d, 4th, 5th, 6th and 8th findings of fact made by the trial court read as follows:

"(1) The order of the Railroad Commission of Texas known as 'Passenger Circular No. 18' containing said Rule 2 is valid.

"(2) Said order of the Railroad Commission is not a regulation of interstate commerce nor is it an interference with or burden upon such commerce, but rather tends to facilitate both intrastate and interstate commerce and promotes the convenience of the traveling public.

"(3) Whatever effect said order may have on interstate commerce is only incidental and then only on account of a violation thereof by defendant.

"(4) The other passenger trains provided by defendant outside of trains Nos. 9 and 209 were not during the period of time in controversy adequate and sufficient to accommodate the local and intrastate passenger traffic on defendant's line of railroad.

"(5) The evidence fails to show that during said period of time defendant had provided adequate facilities to accommodate the traveling public by providing sufficient other passenger trains and so arranging the schedule of the same for that purpose.

"(6) Said trains Nos. 9 and 209 of defendant were not engaged solely in interstate commerce, but both of said trains ran

wholly within the State of Texas and their crews and a large part of their equipment were picked up at Denison and ran wholly within this State, and a large part of the passengers carried on said trains were intrastate passengers.

"(8) On October 19, 1910, defendant wilfully violated and disobeyed said order of said Railroad Commission of Texas by holding its train No. 9 at Hillsboro more than 30 minutes, towit: 1 hour and 50 minutes, after it was due to depart therefrom according to its regular published and advertised schedule, for the purpose of making connection with defendant's train No. 209 which was reliably reported to defendant's agent at Hillsboro to be one hour and fifty minutes late thereat and which report was made and received by the time of the arrival at Hillsboro of said train No. 9." (Tr., pp. 35-36.)

COUNTER PROPOSITIONS AND ARGUMENT.

1. The order, as applied to the trains in question, does not regulate, and does not unreasonably or unlawfully burden, interstate commerce.

On page 19 of their brief, counsel for plaintiff in error say that the Court of Civil Appeals upheld the judgment and order "for the sole and single reason that on the arrival of these through interstate trains at Denison they were remade and run as two sections, one by way of Dallas as No. 9," etc.; on page 21 of the brief they say that the Supreme Court of the State "sustained the judgment of the Court of Civil Appeals solely on the ground that, in the absence of Federal regulations, the order of the Railroad Commission of Texas was a reasonable regulation in aid of interstate commerce." There is no warrant for either of these statements. All the State courts held that the regulation was well calculated to promote the convenience and well-being of the public traveling in intrastate transit; that the regulation was not directed at interstate commerce, and that such effect, if any, as it had upon interstate commerce was purely incidental, reasonable, and in aid of commerce of that character. This, we think, is made plain in the conclusions of the trial court and in the opinions of the Court

of Civil Appeals and the Supreme Court. That this is the character of the order we think there can be no question; and, so considered, we think its validity is put beyond question by the authorities.

The trains here in question are not of the character of the "Knickerbocker Special" involved in the case of C. C. C. & St. L. Ry. Co. vs. Illinois, 177 U. S., 514, because the "Knickerbocker Special" was used "exclusively for interstate traffic" (516) while a large proportion of the traffic on these trains is intrastate, and the trains were inaugurated, at least in substantial part, for the carriage of passengers between many stations within the State. The trips of the trains within the State are almost 600 miles in length, and the trains pass through, stop, and serve many of the principal towns, cities and commercial centers of the State. The trial court found that the evidence failed to show the proportion of the traffic thereon which was interstate and what proportion was intrastate, and in making this finding, we think, the court was fully justified in disregarding the self-serving estimate of the only witness who testified upon the subject, which estimate the witness himself denominated as being a mere guess (Minnesota Rate Cases, 230 U. S., 352, 452.) The trains have each a seating capacity of 365 passengers; the same witness made some investigation as to the number of interstate passengers and estimated them at 110 per train per day. The plaintiff in error had about the best passenger traffic in the State; during the months of September, October and November, 1910, it sold at its stations between Austin and Denison (by no means all of its stations) on an average more than 100,000 intrastate tickets per month. It had no day trains carrying Pullman service or diner service for the three or four hundred mile trips south of Dallas and Ft. Worth; the only other trains, of anything like the character of these, were exempted from the order, and were night trains in their passage through the State; the only other trains offered the State passengers were purely local trains, stopping at all stations, and running upon much slower schedules

than these. The witnesses for plaintiff in error admitted that no train of anything like the equipment and service afforded by trains 9 and 209,—except the night train mentioned as being exempt from the order,—was available for the use of the public traveling within the State. The State courts found that the other facilities available for the use of those traveling within the State were wholly inadequate, and this finding, we think, is amply supported by the evidence. In view of the facts, it must be clear that those traveling for long distances between points within the State would avail themselves of the better schedules and better service offered by trains 9 and 209. And in view of all the facts,—especially the large sale of intrastate tickets, the comparatively small number of interstate passengers shown to be on the trains,—is it not unreasonable to say that, probably, 70 to 75 per cent of the traffic was interstate? But even if it were, are not those traveling within the State entitled to service substantially equal to that afforded to those raveling across the State line? And since the record conclusively, —and without conflict,—shows that such service is not afforded to the intrastate patrons of plaintiff in error, independent of these trains, can it be said that the "other facilities" are adequate? We will, subsequently, mention more fully some of the cases cited in the brief of plaintiff in error, but it may here be remarked, generally, that in every case in any way analogous in principle, this court recognies the validity of State regulation where the facilities afforded the local traveler,—independent of the instrumentality in question,—are inadequate.

There being, therefore, a substantial State traffic to be served by these trains,—and it is to be remembered that these trains were originally and always voluntarily subjected to the use of this traffic, —and there being no conflicting Federal regulation, does not the State have the power to promote the convenience and the general well-being of the travelers within the State in the manner in which it has attempted to do? That the power of the State to provide for the convenience of its citizens, traveling in intrastate com-

merce, stands upon the same ground as its power to provide for the public safety, health, etc., has been repeatedly held by this court.

Lake Shore & Michigan Southern Ry. Co. vs. Ohio, 173 U. S., 285.

Escanaba Co. vs. Chicago, 107 U. S., 678.

So. Covington, etc., St. Ry. vs. Covington, 235 U. S., 537, 548.

Atlantic Coast Line vs. N. Car. Corp. Comm., 206 U. S., 1.

That conformity to established and publicly advertised schedules would substantially promote the convenience of the traveling public would appear to be self-evident. In Atlantic Coast Line vs. North Carolina Corporation Commission, 206 U. S., 1, 22, it was held that proper schedules and conformity thereto were necessary to be furnished in order for a carrier to furnish properly adequate facilities for the convenience of the traveling public. Mr. Crush, General Ticket Agent for plaintiff in error, testified that "the first and greatest factor in handling passenger traffic is to have 'on-time' trains" * * * "a railroad man looks upon delayed trains with the greatest horror; delayed trains are the greatest nightmare that the passenger man has." (Tr., p. —.) The lady, with a baby in arms and two suit cases, who, having ascertained that the train upon which she desires to travel is due to leave her station at 10 o'clock, goes to the station shortly before, and then finds that she must wait at the station until 11 o'clock, and when 11 o'clock arrives it brings no train and she finds that she must wait another hour or two or three, will agree, thoroughly, with Mr. Crush as to the "horrors" of "late" trains. There are, also, probably, a good many able-bodied men, who will agree with Mr. Crush. The failure of the plaintiff in error, substantially, to conform to its (voluntarily) advertised schedules, clearly wastes the time, and frequently the money and business of its patrons taking or leaving the trains at its own stations. In every instance it impairs their patience. But this is not all. The lines upon which these trains operate, between Denison and San Antonio and Galveston, connect

with other lines at about thirty stations. At Greenville, Texas, they connect with another line of plaintiff in error extending from Shreveport, La., to Greenville, a distance of some 170 miles; at Whitesboro they connect with another of its lines extending from Wichita Falls to Dallas, through Denton, a distance of some 180 miles; at Dallas they connect with the Wichita Falls line again; at Waco they connect with another of its lines from Rotan to Waco, a distance of some 325 miles; at Temple they connect with another of its lines from Belton; at Denison they connect with a line of the Texas & Pacific extending east and west from Texarkana, and at Fort Worth they connect with another line of the Texas & Pacific extending across the State from Texarkana to El Paso; at Fort Worth and Dallas they connect with the lines of many other railways traversing the State in all directions; at Waco they connect with the lines of the St. L. S. W. Ry. extending from Texarkana, east and west, to Comanche, Texas, the lines of the Houston & Texas Central and G., C. & S. F.; at Temple they again connect with the line of the G., C. & S. F.; at Austin they again connect with two lines of the Houston & Texas Central and a line of the I. & G. N.; at San Marcos they connect with another line of the plaintiff in error; at San Antonio they connect with the lines of many railways traversing south and southwest Texas; at Houston they connect with the lines of many railways traversing the State in all directions. Of course, the advertised schedules of plaintiff in error and of its connections are so arranged as to impress the traveling public with the probability of reasonably close connections. Non-conformity to the schedules, manifestly causes untold inconvenience, expense and hardships. The order is designed to bring about these connections, and, reasonably, may be expected to assist in bringing them about. If it be granted, as apparently it must be, that conformity to advertised schedules and reasonably close connection is desirable and will promote the convenience of the traveling public, it must be clear that the purpose of the order is good and that its necessary effect is reasonably to accomplish the purpose. Certainly it cannot retard the obtaining of the de-

sired end. At all events, if the purpose is good, the State must have the power of choice of means to bring it about. If it were true that the State has not adopted the *best* means to accomplish the good purpose, this could not defeat its right to exercise its judgment as to means and to give the result of its judgment a fair trial.

We have, therefore, a regulation designed to promote the convenience and well-being of the State's traveling public. If it does what is intended, it will clear the spirit of Mr. Crush's dreams; it will help the plaintiff in error, and other carriers, to dissipate the "horrors" of "delayed trains." To say that it will not assist in the accomplishment of this purpose is to deny the efficacy of all law and to say that penalty statutes furnish no incentive to obedience to law. But,—not gainsaying the advantages of "on-time" trains, and not seriously denying that the order is calculated to assist in bringing them about,—counsel for plaintiff in error say that the regulation is void as imposing an unreasonable and unlawful burden upon interstate commerce. But how can it happen that any burden at all is thus placed? In so far as the order affects the interstate traveler at all, it necessarily conveniences him. We imagine that the interstate traveler would appreciate "on-time" trains as much as anybody; if the order, in its indirect and incidental effect, produces, or is calculated to produce, conformity to schedules, we imagine he would applaud it "to the echo." So far as the interstate traveler upon these trains is concerned, the necessary effect, if any, is to speed his journey; the order cannot, under any view, operate to delay him. If it were granted that the order, in its incidentals, had any effect upon the operation of the train before it reached the State line, it must, also, be granted that the effect would be to cause the train from being delayed, and this the State court held,—as is manifestly true,—to be an aid to commerce. Surely, counsel for plaintiff in error will not say that, because of the existence of the order, the trains have been or will be purposely delayed before they reach the State line! Un-

less the delays, trans the State line, are purposed to spite the order, it cannot, conceivably, have any deterrent effect upon the interstate traveler or upon interstate commerce. Of course, if the trains reasonably conform to schedule, the order has no effect one way or the other,—it simply does not apply. Nor can it have any detrimental effect upon the interstate traveler, if the trains do not reach Denison "on time," or within the limit of the order; in that event, he has had the advantage of the "speeding up" motive furnished by the order, and the probabilities are that he has saved some time at least. The order does not deal with the *arrival* of the train at Denison; it deals with its departure, and its arrival and departure at other stations south. If the train is late into Denison, the fact that plaintiff in error can comply with the order with an instrumentality not connected with the delayed train furnishes a ground of complaint by plaintiff in error to be noticed in another place; if the order is complied, in the alternative manner, the delayed train comes into Denison and leaves Denison in exactly the same manner it would do so if the order did not exist, and in that event, obviously, the interstate passenger upon the delayed train has no claim to interest. If the order is not complied with in the alternative manner, and a penalty is incurred, the penalty runs against the plaintiff in error and not against the interstate passenger; the only effect upon him is that he has had the advantage of the motive to be "on time" into Denison furnished by the order.

If a penalty is inflicted,—counsel may say,—it will operate to increase, pro tanto, the burdens to be borne by all State and interstate traffic in the future, and, ultimately, the interstate passenger and freight shipper will bear an increased burden by reason of the infliction of the penalty, and, thus, interstate commerce will be interfered with. But this is to deal in speculation and in the remote; it is to admit that the effect of the order is extremely indirect and round-about, and not direct. An attack upon the ordinary ad valorem tax levies upon the physical property located in the State could be based upon supposed burden-

ing of commerce with equal plausibility. In Railroad Tax Cases, 15 Wallace, 284, 293, this court answered a like proposition in this language:

"No doubt every tax upon personal property, or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. * * * Is then the tax imposed— * * * a tax on freight transported into or out of the State, or upon the owner of freight, for the right of thus transporting it? Certainly it is not *directly*. * * * That its *ultimate effect* may be to increase the cost of transportation may be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. * * * A tax upon the occupation of a physician or an attorney, or upon a banker, graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax upon his patients, clients or customers, *though the burden ultimately falls upon them.* It is not their money which is taken by the government. *The law exacts nothing from them.*"

See, also, Henderson Bridge Co. vs. Kentucky, 166 U. S., 150; New York, Lake Erie & Western R. R. Co. vs. Pennsylvania, 158 U. S., 431; L. & N. Ry. Co. vs. Kentucky, 161 U. S., 701.

Even if the supposed incidental effect upon commerce were admitted, as we understand the case, we believe it falls within the following principle announced in Gladson vs. Minnesota, 166 U. S., 427:

"Even when its road connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and make any other reasonable regulations for their management, in order to secure the objects of the corporation, and the safety, good order, *conveni-*

ence and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of interstate commerce."

See, also, Atlantic Coast Line Co. vs. North Carolina Corporation Commission, 206 U. S., 1.

We believe there is nothing in the cases cited by counsel for plaintiff in error to condemn the order, even if an incidental effect upon commerce were admitted. They say South Covington, etc., St. Ry. Co. vs. Covington, 235 U. S., 537, is "decisive" of the proposition that the order unlawfully burdens and interferes with commerce. But the regulations condemned in the Covington case were of a character wholly different from that involved here. Only Sections 1 and 6 of the ordinance before the court were condemned in that case; these sections, manifestly, *directly* attempted to regulate matters occurring beyond the limits of the State and in a way which was necessarily and substantially burdensome not only to the carrier, *while operating in another State*, but to the interstate passenger himself while in each of the States. Section 1 made it unlawful for the carrier to permit more than one-third greater in number of the passengers to ride or be transported within its cars and above the number for which seats had been provided. "Practically every car," in continuous trips, operated between the two States, and from 75 to 80 per cent of the passengers carried thereon were actually interstate passengers. These facts existing, it necessarily followed, if the ordinance be obeyed, that the carrier, *while operating in the other State*, either had to refuse admittance to passengers applying for admission to the cars in the other State, or to require some of its interstate passengers, when the cars were "overcrowded" in the other State, to leave the cars when they approached the State line, and, in either event, the carrier, *while operating in the other State*, had to furnish extra cars for the accommodation of its interstate passengers *there*. The effect of Section 1, necessarily, was directly to regulate the number of

pasengers who might be carried upon the interstate cars in the other State, or to regulate the adequacy of the equipment as it approached or left the other State. To comply with Section 6 of the ordinance, the carrier would have been compelled to provide "one-half more than the present number of cars operated by the company, and *more cars than can be operated in Cincinnati within the present franchise rights and privileges, held by the company, or controlled by it, in that city.*" Here then, in Section 6, was a direct command to furnish additional equipment for the transportation of interstate passengers across the State line, which equipment, according to the laws of the other State, could not be operated there. "These facts,"—said the court,—"are to be taken into consideration in determining the nature of the regulation here attempted, and whether it so *directly* burdens commerce as to be beyond the power of the State" (547). A more direct and burdensome regulation of interstate commerce could hardly be imagined; of the nature of Sections 1 and 6 of the ordinance, this court said:

"We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business *there*, but necessarily *directs the number of cars to be run in Cincinnati, and the manner of loading them when there.*"

In its decision upon Sections 1 and 6 the court, therefore, was passing upon an undoubted direct and burdensome attempt of one State to regulate matters occurring in another State; its decision upon Sections 1 and 6 can have no application here, for the simple reason, as shown above, the regulation here in question, under any view, does not in any way undertake to regulate matters in Oklahoma, nor does it possibly have any direct effect upon commerce. We think the portions of the opinion in the Covington case, upholding other sections of the ordinance there before the court, are much more applicable to the questions pre-

sented here. On page 548, the court thus described, and upheld, portions of the ordinance:

"There are other parts of the ordinance which we are of opinion are within the authority of the State, and proper subject matter for its regulation, at least until the Federal authority is exerted. These are the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform, unless a rail or barrier be provided, separating the motorman from the balance of the front platform, as well as those provisions with reference to the requirement to keep the cars clean and ventilated, and fumigated. We think these regulations come within that class in which the court has sustained the right of the local authorities to safeguard the traveling public, and *to promote their comfort and convenience,* only incidentally affecting the interstate business and not subjecting the same to unreasonable demands. New York, N. H. & H. R. R. vs. New York, 165 U. S., 628; Lake Shore & Michigan Southern Ry. vs. Ohio, 173 U. S., 285; Atlantic Coast Line vs. Georgia, 234 U. S., 280, 291, 292."

The regulations mentioned as being valid, in the excerpt just quoted, were to some extent rendered reasonable and valid by reason of the fact that whatever effect they may have been upon interstate traffic this effect was in aid thereof. Manifestly, the regulation here involved, in so far as it may incidentally affect the interstate passengers at all, operates for their benefit. This has been pointed out above. Counsel for plaintiff in error, on page 56 of their brief, take the position that the State may not thus incidentally aid commerce. This position, we think, is directly in teeth of the Covington case and the authorities there cited, as well as the attitude of this court in numerous other cases. In Lake Shore & Michigan Southern Ry. vs. Ohio, 173 U. S., 285, this court sustained a regulation which "aided" commerce, saying:

"It (the State) was entitled of course to provide for the convenience of persons desiring to travel from one point to another

in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wish to come into it. *Its statute is in aid of interstate commerce of that character.*"

See, also, Mobile County vs. Kimball County, 102 U. S., 691.

On page 43 et seq. of their brief, counsel for plaintiff in error say:

"It clearly appears from the most casual reading of the order of the Railroad Commission that it was not meant to be in aid of interstate trains or interstate travel, but was for the purpose of discriminating in favor of local passengers at the expense of interstate passengers. As pointed out, the running of a special or substitute train either from the junction point at Red River or Denison would in no way have aided the passengers on the interstate trains, but would have had the result of tying them up high and dry on the Red River bridge or at Denison, and the substitute train would have simply been in aid of local State passengers."

The logic of this statement is nonsequential, not to say nonsensical. Its unfairness is patent. Of course, no purpose to discriminate against interstate passengers can be found in the order upon a "casual" reading or a prolonged study. No such purpose exists, and distinguished counsel knew it did not exist when their brief was written. As a matter of course, the Railroad Commission was not dealing with interstate traffic when it made the order; the order was made to promote the convenience and well-being of those traveling within the State,—but that it has the incidental effect of aiding the interstate passenger we think is obvious from the record. But in an attempt to defeat the obvious conclusion to be drawn from the matter, counsel suggest a matter not pleaded or proved, but affirmatively disproved by every fact and circumstance in the record. They say that if the plaintiff in error should choose to comply with the order by running a substitute train out of Denison this "would have had

the result of tying them (the interstate passengers) up high and dry at Red River bridge or at Denison." In other words, we are to imply, the plaintiff in error would voluntarily break its contract with every interstate passenger it had and voluntarily delay them at "Red River bridge" or at Denison; if it should choose thus to maltreat its patrons, its act would be purely voluntary, and in no sense would it be chargeable to the order. But, of course, this proposition is mere "talk"; if a substitute train were run, the regular train would continue its trip south from Denison. The record shows that, during the period of time involved, plaintiff in error voluntarily operated, at various times, two and three extra sections of trains Nos. 9 and 209, from Denison south, and when this was done the regular trains were not discontinued. (Tr., p. 102.) The regular trains were advertised to complete their trips, and the plaintiff in error was under contract with its passengers and with the M., K. & T. Ry. Co. to have them do so. (Tr., pp. 81-82.) We think, therefore, that the suggestion as to "tying" the interstate passengers up at the bridge or at Denison is wholly gratuitous.

Counsel for plaintiff in error advance the proposition that the running of substitute trains, by reason of their cost, will impose a burden upon interstate commerce. Nothing can be found in the order requiring the running of substitute trains; this is optional with the carrier, an alternative method whereby the carrier may comply if it cares to do so, as held by the State courts. This matter will be more fully discussed in another connection; we desire here simply to refer to what we have said above on page — of this brief with respect to the supposed connection between the penalty to be inflicted and interstate burdens. Here, as there, the effect if any upon interstate commerce would be remote, indirect and incidental.

2. The order of the Commission is not void under the due process of law clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The trial court found that the facilities available for intrastate traffic, other than trains Nos. 9 and 209, were inadequate. The opinion of the Court of Civil Appeals referred to and quoted from on pages 61-62 of the brief of plaintiff in error was set aside by that court on the State's motion for rehearing. (Tr., p. 145.) The result was that the findings and conclusions made by the trial court were left in full force and effect, with the approval of the Court of Civil Appeals, and these findings and conclusions are necessarily approved by the Supreme Court of the State in its opinion denying the application for writ of error. But if this court should follow the suggestion of counsel for plaintiff in error and for itself examine the evidence upon the point, we think it would find that the purely local facilities were wholly inadequate. Upon this point,—as shown in the "statement of the case."—the following facts are uncontradictedly shown by the record, and most of them were specifically found by the trial court:

The plaintiff in error, in Texas, operates but one other train of anything like the "class" or character of trains Nos. 9 and 209; the other trains referred to,—Nos. 5 and 205,—are night trains, and are exempted from the operation of the order. (Tr., p. —.) Trains Nos. 9 and 209 are much superior in equipment and service to any train generally available to intrastate traffic. No train operated by plaintiff in error, in Texas, south of Dallas and Fort Worth,—except 9, 209, 5 and 205,—afford Pullman or dining car service. The State law, under the facts of this case, requires the furnishing of adequate Pullman and sleeping car service, G., C. & S. F. Ry. Co. vs. State, and the failure to furnish it is a failure to furnish adequate facilities. G., C. & S. F. Ry. Co. vs. State, 169 S. W. Rep., 385. All other trains available for intrastate travel are purely local trains, making stops at all stations, and running upon slow schedules,—much slower than trains Nos. 9 and 209. Trains Nos. 9 and 209 are scheduled to stop at and serve many of the principal cities, towns and commercial centers of the State, and carry passengers be-

tween each and all of the stations where they are scheduled to stop. These trains make long-distance trips in the State,—almost 600 miles in length,—traversing the most thickly populated section of the State. The passenger business of the plaintiff in error is, perhaps, the heaviest of any carrier in the State. If it be true that the intrastate passengers, making extended trips, are entitled to the same character of accommodations and the same speed of schedules, it would appear to be clear that they are not adequately provided for on the other trains operated by the company. If they are entitled to Pullman service, as the State law requires, the failure to furnish it on other trains, of itself, renders the other trains inadequate. We think the facts warrant the conclusion that the other facilities are not adequate, and if this be true even counsel for plaintiff in error admit that the trains can be subjected to the regulation; if this be true, the extra trains could be required.

But, they say, the only witness upon the subject testified that the other facilities were adequate. His testimony, however, was but the expression of opinion, made without any investigation and in line with his other testimony which he denominated as a mere "guess." This witness was the ticket agent for plaintiff in error, and his testimony flavors somewhat of self-service. But counsel are mistaken when they assume that this testimony is uncontradicted. The facts detailed above, we think, contradict his opinion at every point; these facts are not disputed, and they bear the approval of specific findings by the courts.

Counsel for plaintiff in error assert, and reassert, that it would cost from $120,000 to $400,000 "to equip special trains, to say nothing of the cost of operating them." This, under the record, would seem to be unbelievable. In paragraph 3 of its formal answer in the trial court it was alleged that the cost would be about $30,000. (Tr., p. 22.) The estimate of $120,000 to $400,000 was given by the general ticket agent of plaintiff in error, and it is not supported by any data, except that the estimate of $400,000 assumes that four trains, consisting of five Pullmans, two chair cars,

a combination smoking chair car, etc., and a locomotive, for each train,—or a total of twenty Pullmans, eight chair cars, two combination smoking chair cars, four locomotives, etc.,—would have to be purchased and reserved exclusively for the use of the extra trains; his lower estimate eliminates the Pullmans, and assumes that two extra trains continuously held in reserve would be sufficient. The fundamental vice in this estimate assumes a dual form: In the first place, it is not shown that the plaintiff in error does not already have the unused equipment necessary for such extra trains as might be necessary; a conclusion to the contrary is impelled by the evidence; it is shown without conflict that plaintiff in error has always voluntarily run two, and sometimes three, sections of trains 9 and 209 south of Denison (Tr., p. 102), and to do this, of course, the equipment was already available; the court, perhaps, judicially knows that well-managed railroads always have enough extra equipment available at important division points, such as Denison, to man extra trains, and that this was especially true during the period of time here involved (September and October, 1910). But if this fact were not commonly known, its existence is, we think, to be clearly inferred from the record; certainly its non-existence is not proved. In the second place, the proposition advanced as to the cost assumes that trains 9 and 209 are too late every day and that the equipment for the extra trains must be held in reserve for exclusive use on such occasions; but, as already pointed out, plaintiff in error has always voluntarily run these trains in two or more sections south of Denison to take care of its business (Tr., p. 102), and, of course, when this was done the order did not apply, and, besides, if new equipment were bought it could be and would be frequently used for this purpose. The witness who gave the estimates is not shown to be an operating man, or to have anything to do with the procuring of equipment; nor are his qualifications upon this point otherwise shown. The proposition as to the cost rests entirely upon his general estimate which, of course, is a pure "guess" and which also involves all the elements of self-service. The fact that counsel, in drawing the answer—probably

after consultation with the proper officials of the company—estimated the cost at only $30,000, greatly detracts, we think, from the credibility of their witness' estimate. We submit that there is nothing in the record to justify even the estimate of $30,000 formally pleaded; the inference, we think, is, rather, that the plaintiff in error already had available all the equipment necessary for the composition of such extra trains as it might choose to run in order to comply with the order. Be it remembered that this proposition as to cost is advanced to invalidate State action, taken in the exercise of its undoubted power to provide for the convenience and well-being of its citiens; this being true, according to this court, in the Minnesota Rate Cases, 230 U. S., 352, 452, mere "conjecture" cannot be taken,—the "invalidating facts must be proved." Plaintiff in error had men in its employment who were qualified to tell the court definitely what it would cost to equip a train of any given dimension; it also had men in its employment who were in a position to say, definitely, what equipment was already on hand and available; the failure to disclose this information argues very strongly, we think, for the proposition that the plaintiff in error was already in a position to run whatever extra trains might be necessary without the necessity of acquiring new or additional equipment. Plaintiff in error, however, relied upon the "conjecture" of its ticket agent, preferring not to give the definite information easily available; and in doing so, we think, it failed to meet the burden and principle of proof announced by this court in the Minnesota Rate Cases, supra.

There are other respects in which the evidence fails to disclose the necessary "invalidating facts."

The order does not, as repeatedly stated, require the running of extra trains; that the order may be rendered inapplicable where an extra train is run is due to the control of the carrier over its schedules and its voluntary act in curing the delinquency of its regular trains in this manner. Since the running of the extra trains is thus due to voluntary acts of the carrier, it seems to us, and we urge, that no Federal question arises under the Fourteenth Amend-

ment. In this aspect, the case differs from that of Atlantic Coast Line vs. North Carolina Corporation Commission, 206 U. S., 1, where the Corporation Commission and the State courts treated the running of an extra train as "the most direct and efficient means" of complying with the order there in question. Here the order by express provision or by necessary intendment does not require the running of an extra train; the order here simply requires reasonable conformity to the advertised schedule,—the extra train is run, if at all, purely at the option of the carrier, and while the State courts held that this would "comply" with the order this was so held because the voluntary act of the carriers destroyed the facts which would bring the order itself into operation. But if the Federal question arises, in this feature of the case, the invalidating facts are not proved.

The plaintiff in error neither alleged nor attempted to prove that the running of the extra train would entail a pecuniary loss, either with respect to the particular train so run, or with respect to the general revenues of the company. The record—as to pleadings and proof—is absolutely silent upon this point, and that it is so strongly evidenced by the failure of counsel for plaintiff in error, in their brief, to urge the proposition of actual "loss." So far as the court knows, or may learn from the record, the plaintiff in error's entire business may be highly profitable; its intrastate business as a whole may be highly profitable; the running of the extra trains may produce an attractive profit. That the running of extra trains, in a manner such as to render the order inapplicable, is fully warranted by the traffic and the returns therefrom is a conclusion reasonably to be drawn from the record; this conclusion, we think, flows from the admitted fact that these extra trains are frequently voluntarily run sometimes in two or three sections by plaintiff in error because the "business warrants." (Tr., p. 102.) At all events, if the running of extra trains follows from the necessary intendments of the order, we think no question of "taking without process" would arise in the absence of a clear showing of "loss," either from the operation of the particular facility, or from

the business as a whole. As stated, no attempt was made by plaintiff in error to show "loss" in either aspect. On the contrary, such facts and circumstances as are in the record, in any way relevant to the question, tend to negative the idea of "loss." These facts and circumstances have been mentioned throughout the argument on other features of the case; they will only, briefly, be epitomized here: The linss of the plaintiff in error traverse, for long distances, the most thickly populated section of the State, and its trains serve very many of the important cities and towns of the State; its main lines, over which these trains operate, being north and south, and connect with numerous east and west lines of its own and of many other companies, and form, perhaps, the most important highway of travel in the State; its passenger traffic is, perhaps, the heaviest of any carrier in the State—its traffic warrants the running of these very trains in two and three and sometimes four sections, on many occasions, and they are so run; during the months of September, October and November, 1910,—including the very time in question,—it sold tickets to intrastate passengers, on average of more than 100,000 per month at the portion of its stations located on the main lines between Austin and Denison, and its receipts from these tickets for the three months mentioned were $448,211.84 (Tr., p. 101); this revenue included only the intrastate tickets sold at the stations on about 750 miles of line, while the company operates about 1700 miles of line; this revenue did not include tickets sold at stations on connecting lines to passengers destined to points on this company's lines, nor did it include interstate tickets sold to points outside of the State or tickets sold at points outside of the State to passengers destined to points on this company's lines in Texas; the total number of trains run on the various divisions south of Denison are shown in the findings of fact, and if the number of trains, each way, be multiplied by the mileage of each, it will appear that the maximum mileage per day made on these divisions by all passenger trains, including Nos. 9 and 209, was 5692 miles; if this daily mileage is multiplied by the ninety days included in the revenue period mentioned it will show

a total mileage for the three months of 512,280 passenger train miles; the witness Monday, an operating official of the plaintiff in error, testified that the average cost of operating its passenger trains was 80 cents per mile (Tr., p. 100); if the mileage for the three months is multiplied by this cost per mile, a result will be obtained which is much less than the revenue shown; this result, of course, will not include the interest on the investment in equipment, nor the cost of maintenance thereof, but, as already shown, neither does the revenue for the three months by any means include all the revenue earned.

These facts do not at all indicate that the operation of extra trains would entail "losses"; certainly, they do not indicate it with the precision required by the principle announced by this court in the Minnesota Rate Cases, supra. In so far as they bear upon the question at all, it seems to us they strongly indicate the contrary.

The record in favor of the validity of the order in this respect, is assuredly much stronger than the record before this court in Atlantic Coast Line vs. North Carolina Corporation Commission, supra, for there it clearly and undoubtedly appeared that the running of the extra train would entail a "loss." Says this court, at page 23: "This proposition is based upon the hypothesis that the order, by necessary intendment, directed the Coast Line to operate an additional train, *although such train could not be operated without a daily pecuniary loss*"; even the Corporation Commission and the State court, in that case, assumed that the operation of the train would produce a loss; but the order was, nevertheless, sustained by this court; and that case, we submit, is decisive against the position of the plaintiff in error. See also Mo. Pac. Ry. Co. vs. Kansas, 216 U. S., 262, 277 et seq.

On page 61 of their brief counsel for plaintiff in error cite Railroad Commission of Texas vs. G., H. & S. A. Ry. Co., 112 S. W., 345; but this case is inapplicable here for the reason that it was decided on a demurrer—the Railroad Commission declining to answer the allegations of the railroad—these allegations being that the order was unreasonable and arbitrary, and that adequate facil-

ities had already been furnished, which allegations the court, under the demurrer, treated as being true.

3. New conditions suggested by plaintiff in error for the consideration of the court.

On pages 51 and 52 of their brief counsel for plaintiff in error present an argument, not based upon conditions as they existed in September and October, 1910,—the time here involved—and not contained in the record, but based upon the present conditions growing out of the war situation, and its consequent demand for railroad equipment and service. We suppose the idea of this is to impress the court with the proposition that the affirmance of the judgment in this case would now operate to produce hardship and to impair the service. We do not think that the court ought to, or will, consider this matter, but if it is entitled to consideration, then there are certainly related facts and conditions which ought also to be given their due weight.

In the first place if any new conditions have arisen since the date of this judgment which would make the enforcement of the order unreasonable or unlawful, plaintiff in error has full opportunity to bring these matter before the Railroad Commission of Texas and to produce evidence showing that the order should be set aside, or modified so as to exempt from its operation these or any other trains. If such new conditions exist, if the facts now existent require such relief, plaintiff in error may apply for it to the administrative body clothed with the power and charged with the duty of regulating the matter. If the requisite facts exist and the Commission should refuse the relief, the courts are open either after such application or as an original proposition, for the litigation of the order as applied in the light of the new conditions. That this opportunity exists has been shown above.

But if new matter is to be brought in, or an argument is to be based upon new conditions, the entire change of conditions should be before the court; and in view of this, we think, counsel ought to have been fair enough to have told the court the following facts:

That since the judgment was rendered in this case, and to take care of its business, plaintiff in error has inaugurated, and is now operating, another interstate train,—known as the Texas Special,—between St. Louis, Kansas City and San Antonio, said train operating each way daily, and which trains are exempt from the order in question.

Since the inauguration of the "Texas Special" trains Nos. 9 and 209 have been operated largely as local trains, making practically all stops, and operated largely for local business, local business being encouraged to patronize Nos. 9 and 209 in preference to the Texas Special.

We respectfully submit that the judgment of the district court of Travis county, Texas, and of the Court of Civil Appeals should in all things be affirmed, and for such relief we pray.

Respectfully submitted,

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